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No.

In The

Supreme Court of the United States

October Term, 1982

ALBERTA GAS CHEMICALS, LTD.,
Petitioner,

v.

CELANESE CORPORATION and
CELANESE CHEMICAL COMPANY, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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September 20, 1982

QUESTIONS PRESENTED

1. Whether a party can bring a private action against a competitor who deliberately presents fraudulent misstatements to a federal administrative agency in the course of a formal investigation by that agency, with the intent, and effect, of substantially damaging that party in the marketplace, and where the federal agency is powerless to award a remedy?

2. Whether a United States District Court has jurisdiction to entertain the action?

PARTIES TO THE PROCEEDINGS

The caption of the case in this Court contains the names of all parties in the Court of Appeals and District Court.*

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* The stockholders of petitioner Alberta Gas Chemicals, Ltd. (each of which owns 50% of the stock of petitioner), are ALLARCO DEVELOPMENTS LTD. and NOVA, AN ALBERTA CORPORATION. Petitioner partially owns a subsidiary known as Petralgas Chemicals N.Z., Ltd. The following entities are affiliates of petitioner: AGEC Security Corporation; A.G. Industries International, Inc.; A.G. Investments Ltd.; A.G. Pipe Lines Inc.; A.G. Pipe Lines (Canada) Ltd.; The Alberta Gas Ethylene Company Ltd.; Algas Engineering Services Ltd.; Allarco Financial Corporation Ltd.; Allarco Group Ltd.; Allarco Holdings Inc.; Allarco Inc.; Allar-Tic, Inc.; Canstar Oil Sands Ltd.; Can Ocean Resources Ltd.; Cardev Ltd.; Carma Developers, Inc.; Carma Developers Ltd.; Carma Developers (Arizona) Inc.; Carma Developers (California) Inc.; Carma Developers (Colorado), Inc.; Carma Developers (Florida) Inc.; Carma Developers (Oregon), Inc.; Carma Developers (Texas) Inc.; Carma Developers (Washington) Inc.; Carma Investments, Ltd.; Carma Ltd.; Carma Properties, Inc. (Arizona); The Christiana Companies, Inc.; Diamond Shamrock Alberta Gas; Energy Equipment & Systems Inc.; ENESCO Chem Ltd.; Foothills Pipe Lines (Yukon) Ltd.; Grove Valve and Regulator Company; Husky Industries Inc.; Husky Oil Company; Husky Oil Ltd.; Husky Oil Operations Ltd.; Interprovincial Steel and Pipe Corporation Ltd.; Ledeen Flow Control Systems Inc.; Lifecycle, Inc.; Northwest International Bank and Trust Company; North West Trust Company; Novacor Chemicals Ltd.; Novalta Resources Ltd.; Noval Technologies Ltd.; NOVA/Husky Research Corporation Ltd.; Pan-Alberta Gas Ltd.; Petrosec Exploration Inc.; Pipeline Hydraulics Engineering Inc.; Q&M Pipe Lines Ltd.; Seaboard Life Insurance Company; Standard Guarantee Corp.; Steel Alberta Ltd.; Trans Quebec & Maritimes Pipeline Inc.; Travellers Acceptance Corporation, Ltd.; Travellers Acceptance Corporation (California); Uno-Tex Petroleum Corporation; WAGI International S.p.A.; Western Star Trucks Inc.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Alberta Gas Chemicals, Ltd. ("Alberta Gas") respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on May 28, 1982.

OPINIONS BELOW

The judgment of the Court of Appeals affirming the dismissal of petitioner's complaint and its order denying rehearing in banc are set forth as Appendices E and F, respectively. As stated in the judgment, the Court of Appeals adopted the two opinions of the District Court for the Southern District of New York. The first opinion of the District Court is reported at 497 F.Supp. 637 (S.D.N.Y. 1980) and appears as Appendix A.

The opinion of the Court of Appeals on the first appeal, reported at 650 F.2d 9 (2d Cir. 1981), appears as Appendix B. The unreported stay of proceedings issued by the District Court following the first appeal is Appendix C. The second opinion of the District Court, reported at 529 F.Supp 226 (S.D.N.Y. 1981), is Appendix D.

JURISDICTION

The judgment of the Court of Appeals was entered on May 28, 1982, and a timely petition for rehearing containing a request that the appeal be reheard in banc was denied on July 14, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

This case presents the issue of whether a private action for fraud and unfair competition can be maintained against a company, which is a principal competitor of the plaintiff, on the basis that the competitor intentionally misrepresented facts to the United States International Trade Commission (the "Commission") with the purpose, and effect, of damaging the plaintiff in the marketplace. The Court of Appeals held that no such cause of action can be maintained, and it affirmed the dismissal of Alberta Gas's complaint.[1]

The Parties

Alberta Gas is the largest producer of methanol in Canada and is a substantial seller of methanol in the United States market. Celanese[2] is the largest producer of methanol in the world and is one of the two dominant sellers of methanol in the United States market.

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[1] Because this case was dismissed on the pleadings on the ground that the complaint failed to state a cause of action, the allegations of the complaint (App. G) are taken as true. *See Walker Process Equipment, Inc.* v. *Food Machinery and Chemical Corp.*, 382 U.S. 172 (1965).

[2] Respondents Celanese Corporation and Celanese Chemical Company, Inc. are together herein referred to as "Celanese".

Celanese's Fraudulent Evidence

In June, 1979, the Commission in a "dumping" proceeding determined that sales of methanol from Canada (by Alberta Gas) were likely to injure the United States methanol industry. The Commission's determination was based on fraudulent misrepresentations by Celanese. Celanese deliberately falsified facts, known only to it, as part of an unlawful plan to injure Alberta Gas by (i) delaying or preventing it from constructing additional facilities to produce methanol in Alberta, Canada, and (ii) hindering Alberta Gas in its efforts to sell methanol in the United States.

During the proceedings, the Commission twice asked Celanese whether it might construct methanol producing facilities in the decade of the 1980's. That testimony was of critical importance to the issue before the Commission, *i.e.*, the demand for methanol in the 1980's and the likelihood of future injury to the United States industry because of an additional Canadian facility planned by Alberta Gas. In its response, Celanese failed to disclose its then-contemplated $255 million facility in Alberta, Canada (to be built next to Alberta Gas's headquarters), or its then-contemplated $1 billion facility to be built in the United States — the world's largest methanol producing facility. (Both facilities were intended to produce methanol for the United States market.) To the contrary, Celanese testified that there already existed sufficient methanol producing capacity in the United States to supply the United States demand for methanol during the 1980's. Celanese also testified that that demand would grow at a rate of 6% to 7% per annum. In fact, Celanese believed that the demand for methanol would grow at the rate of at least 10% per annum during the period.

At the conclusion of its proceedings, the Commission found that the United States methanol industry was not presently being injured. However, based upon the false testimony of Celanese, the Commission found a "likelihood of injury" in the future. As a result of that adverse determination, Alberta Gas suffered substantial monetary damages in the marketplace.

Alberta Gas Could Not Have Discovered the Falsity of the Evidence

Because of the nature of Celanese's testimony and the nature of the Commission's proceedings, Alberta Gas was precluded from determining the actual facts with respect to Celanese's plans and beliefs. Those plans and beliefs were within the exclusive knowledge of Celanese and there was no procedural mechanism for Alberta Gas to determine them.

The Commission's investigation of methanol was in the nature of an *in rem* proceeding. No administrative law judge presided. There was no discovery. The Commission's procedures were exempted by statute from numerous provisions of the Administrative Procedure Act, including the bar against *ex parte* evidence set forth in 5 U.S.C. §557(d)(1)(A). In fact, the applicable regulations provided for the submission of *ex parte* written evidence to the Commissioners.[3]

It was not until 90 days after the Commission's decision that Celanese publicly announced its true intentions. Shortly thereafter, it applied to the Alberta Energy Resources Conservation Board for permission to build its $255 million Alberta plant. In the proceedings before that Board, Celanese testified that it believed that, contrary to its testimony before the Commission, the demand for methanol in the 1980's in the United States would far exceed supply.

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[3] When the Commission's investigation was conducted in the spring of 1979, the applicable regulations were contained in 19 C.F.R. Chapter II, Subchapter B. That subchapter was entitled "Nonadjudicative Investigations." 19 C.F.R. §201.6(g), which was made applicable to anti-dumping investigations by 19 C.F.R. §207.5(e), provided that: "Any business information submitted in confidence and determined to be entitled to confidential treatment shall be maintained in confidence by the Commission and not disclosed except as required by law." No statute or regulation provided for the Commission's release of such confidential information to a competitor until 19 U.S.C. §1677f was enacted (effective January 1, 1980, six months after the Commission's methanol determination).

Alberta Gas Has Been Precluded from any Remedy for the Damages Suffered by It

In this action, Alberta Gas seeks damages for (i) the losses sustained in connection with sales of methanol in the United States, (ii) lost sales of methanol in the United States and elsewhere and (iii) the delay in construction of additional methanol facilities in Alberta, Canada. Neither the Commission nor the Court of International Trade (to which the Commission's determination can and was appealed[4]) has jurisdiction to award Alberta Gas any remedy for the damages it suffered as a result of Celanese's fraudulent conduct.

The affirmance by the Second Circuit of the dismissal of the complaint has deprived Alberta Gas of any remedy to recover the damages inflicted on it by Celanese and has permitted Celanese to go unpunished for its fraudulent misconduct. The Second Circuit's decision is contrary to every relevant precedent and is directly contrary to decisions in the Fifth, Ninth and District of Columbia Circuits in cases that are factually indistinguishable. *See, Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252 (9th Cir. 1982); *Woods Exploration & Producing Co. v. Aluminum Company of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); *Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972).

History of the Litigation

On April 2, 1980, Alberta Gas filed its action against Celanese for fraud and unfair competition in the Southern District of New York. Jurisdiction was based on diversity of

[4] The determination of the Commission was ultimately reversed by the Court of International Trade on grounds unrelated to Celanese's fraudulent misstatements. *Alberta Gas Chemicals, Inc.* v. *United States*, 515 F.Supp. 780 (U.S.C.I.T. 1981). Between the time that the Commission's determination was rendered and the time it was reversed, Alberta Gas suffered millions of dollars of business damages, and it is the attempt to recover those damages which is the basis for Alberta Gas's suit.

citizenship.[5] In October 1980, the District Court dismissed Alberta Gas's complaint for failure to state a claim upon which relief can be granted. In addition, the District Court stated that: "[e]ven if plaintiff's complaint stated a cause of action, this Court's jurisdiction over this dispute seems dubious" and "even if plaintiff stated a cause of action and this Court had jurisdiction over it, the doctrine of primary jurisdiction would constrain us from hearing the case at this time." *Alberta Gas Chemicals, Ltd.* v. *Celanese Corp.*, 497 F.Supp. 637, 640, 641 (S.D.N.Y. 1980) (App. A, pp. A-5, A-6).

Alberta Gas appealed that decision to the United States Court of Appeals for the Second Circuit. On May 12, 1981, a panel of the Second Circuit reversed the District Court and remanded the action with a direction that it be stayed pending an application by Alberta Gas to the Commission requesting it to determine whether Celanese had misrepresented facts to the Commission and, if so, whether those misrepresentations had resulted in the Commission's determination adverse to Alberta Gas. 650 F.2d 9 (2d Cir. 1981) (App. B). Alberta Gas promptly made the application. On August 26, 1981, the Commission denied Alberta Gas's application on the ground that the Commission had no procedure to hear such matters. (The Commission also noted that its determination had been reversed by the Court of International Trade and, therefore, that the Canadian methanol matter was moot with respect to the Commission.) (App. H).

On September 10, 1981, Alberta Gas submitted the decision of the Commission to the District Court and requested that the action proceed. The District Court again dismissed the complaint "for the reasons stated in the opinion reported at 497 F.Supp. 637" (529 F.Supp. at 227) (App. D, p. D-2), and Alberta Gas again appealed to the Second Circuit. That Court affirmed the District Court's decision for the reasons set forth in the District Court's two opinions. (App. E). A petition for rehearing in banc was denied. (App. F).

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[5] Petitioner is a Canadian corporation with its principal place of business in the province of Alberta. Respondents are American corporations with their principal places of business in the United States.

REASONS FOR GRANTING THE WRIT

The decision below, if left standing, will substantially damage the integrity of federal administrative agencies. The refusal to grant Alberta Gas a private remedy will encourage persons appearing before administrative agencies to submit false or fraudulent information because the rewards for doing so will be great and the risks will be minimal.

In sharp contrast to the decision below, the Ninth Circuit recently held in *Clipper Exxpress* v. *Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252 (1982), that no immunity from a damage action should be available to a person misrepresenting facts to a federal administrative agency. It correctly stated (what this Court has previously recognized) that "[a]djudicatory procedures will not always ferret out misrepresentations." *Id.* at 1272; *see, California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 512 (1972). The Ninth Circuit correctly recognized that "[a]dministrative bodies . . . rely on the information presented by the parties before them. They seldom, if ever, have the time or resources to conduct independent investigation. The recognition . . . of a private right of action based on the fraudulent misrepresentation, might be sufficient incentive to induce parties not to fraudulently misrepresent facts." 674 F.2d at 1272 (footnote omitted).

Except for the decision below, each Court of Appeals which has focused on the issue has held that a party can maintain a private cause of action for damages suffered by it as a result of misrepresentations made to an administrative agency by another party. The decision below denies an injured party any remedy to recover damages intentionally and successfully inflicted upon it and encourages competitors in an industry to misstate facts to federal administrative agencies. That decision is irrational on its face and is directly contrary to the law established by the Fifth, Ninth and District of Columbia Circuits. This Court should reverse the judgment below in order to establish a rule of law in the Second Circuit that protects the integrity of federal administrative agencies and makes the law of the various Circuits uniform.

I

THE SECOND CIRCUIT'S HOLDING THAT ALBERTA GAS HAS FAILED TO STATE A CAUSE OF ACTION IS INCORRECT AND IS IN DIRECT CONFLICT WITH DECISIONS OF THE FIFTH, NINTH AND DISTRICT OF COLUMBIA CIRCUITS

The precise rationale of the Second Circuit's holding is not clear. By adopting the opinions of the District Court, the Second Circuit appears to have held that the Alberta Gas complaint was a collateral attack on a determination of the Commission and, therefore, the question of whether Alberta Gas has stated a cause of action is a question of federal law because "[t]he scope and effect of a federal decree is governed by federal law."[6] 497 F.Supp. at 640 (App. A, p. A-5). Alternatively, the Second Circuit may have held that even if Alberta Gas stated a cause of action for fraud and unfair competition under state law, "then it could not be followed in the federal courts...." (App. A, p. A-5). Regardless of which description of the holding is more precise, the decision below is demonstrably incorrect.

It has long been established that a cause of action exists to recover damages suffered by a plaintiff where the defendant misrepresented facts to a federal administrative official. *Al Raschid* v. *News Syndicate Co.*, 265 N.Y. 1 (1934) (relying on *Ratcliffe* v. *Evans*, [1892] 2 Q.B. 524). In *Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972), the defendants were alleged to have suppressed and misrepresented information relating to a drug manufactured by the plaintiffs which was being considered by the Federal Food and Drug Administration. The plaintiffs sought damages and injunctive relief based on an alleged conspiracy under state and federal

[6] In fact, at the time of the second decision of the district court dismissing the complaint, the Commission's determination had been reversed by the Court of International Trade on grounds unrelated to Celanese's fraud. Clearly, Alberta Gas was not collaterally attacking a determination which had already been vacated.

antitrust laws. The District of Columbia Circuit held that the plaintiffs stated a cause of action:

> "The basic concern of the courts of appeal (and one District Judge) in both *Woods* and *Trucking Unlimited* may be deemed the integrity of the regulatory process. No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption." 466 F.2d at 278 (footnotes omitted).[7]

The long-standing concern for protecting the integrity of administrative agencies was reiterated in the recent decision of the Ninth Circuit in *Clipper Exxpress, supra,* in which a regulated freight forwarder subject to the jurisdiction of the Interstate Commerce Commission sued other trucking companies and a trucking rate bureau. The basis for the suit was misrepresentations made by the defendants to the ICC in connection with an application by the plaintiff to reduce its freight rates. The plaintiff was ultimately successful before the ICC, but, because of delay resulting from the defendants' misrepresentations, the plaintiff alleged that it suffered damages in the marketplace. The Ninth Circuit held that a valid claim was stated:

> "We hold that the fraudulent furnishing of false information to an agency in connection with an adjudicatory proceeding can be the basis for antitrust liability, if the requisite predatory intent is present and the other elements of an antitrust claim are proven." 674 F.2d at 1271.

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[7] The court rejected the use of the *Noerr-Pennington* defense (*Eastern Railroad Presidents Conference* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America* v. *Pennington*, 381 U.S. 657 (1965)), because that defense applies only to the " 'right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws.'... Where these political considerations are absent the *Noerr* doctrine is inapplicable. . . ." 466 F.2d at 277 (quoting from *Woods Exploration and Producing Co.* v. *Aluminum Company of America*, 438 F.2d 1286, 1296 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972)).

In response to the defendants' argument that they enjoyed first amendment protection in submitting evidence to the ICC, the court stated:

> "As the Supreme Court stated in *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 340, 94 S.Ct. 2997, 3007, 41 L.Ed.2d 789 (1974); 'there is no constitutional value in false statements of fact.' Contrary to defendants' assertions, there is simply no basis to hold that deliberately misrepresenting facts to an administrative body for anticompetitive purposes enjoys blanket first amendment protection." *Id.* at 1271.
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> * * *
>
> "Clipper claims defendants knew the falsity of their statements, and made those statements in a deliberate attempt to mislead a regulatory body. We can conceive of no stricter standard than that satisfied by the facts alleged by Clipper." *Id.* at 1272.

The Ninth Circuit in *Clipper Exxpress* observed that the supplying of fraudulent information to agencies exercising adjudicatory functions threatens their fair and impartial functioning:

> "As the Supreme Court noted in *Trucking Unlimited,* the adjudicatory sphere is much different from the political sphere. . . . In the adjudicatory sphere . . . information supplied by the parties is relied on as accurate for decision making and dispute resolving. The supplying of fraudulent information thus threatens the fair and impartial functioning of these agencies and does not deserve immunity from the antitrust laws. *See, e.g., Israel* v. *Baxter Laboratories, Inc.*, 466 F.2d 272, 275-80 (D.C. Cir. 1972)." *Id.* at 1271.[8]

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[8] In *California Motor Transport Co.* v. *Trucking Unlimited,* 404 U.S. 508, 512 (1972), this Court stated that perjury of witnesses in the adjudicatory process would be "unethical conduct" which would not be immune from the application of the antitrust laws.

The Ninth Circuit stated that the existence of a private right of action is an important deterrent to persons who would otherwise fraudulently testify before administrative agencies:

> "Adjudicatory procedures will not always ferret out misrepresentations. Administrative bodies and courts, however, rely on the information presented by the parties before them. They seldom, if ever, have the time or resources to conduct independent investigations. *The recognition, however, of a private right of action based on the fraudulent misrepresentation, might be sufficient incentive to induce parties not to fraudulently misrepresent facts." Id.* at 1272 (emphasis added; footnote omitted).

The relevant facts of *Clipper Exxpress* cannot be distinguished from those in the instant action. Alberta Gas has alleged a cause of action for unfair competition against one of its principal competitors in the United States methanol industry. The basis for the action is the evidence of Celanese before the International Trade Commission which it intentionally falsified to give it a competitive advantage in the marketplace. In both cases, the plaintiff was ultimately successful before the agency (or on appeal) but both suffered damages as a result of the defendants' fraud during the period prior to its success.

In its opinion in *Clipper Exxpress,* the Ninth Circuit relied on the Fifth Circuit's decision in *Woods Exploration & Producing Co.* v. *Aluminum Company of America,* 438 F.2d 1286 (5th Cir. 1971), *cert. denied,* 404 U.S. 1047 (1972), which, like *Clipper Exxpress,* was the same as the instant action. In *Woods,* the plaintiff alleged that the defendants conspired to prevent the plaintiff from competing in the production of natural gas by filing false production forecasts with the Texas Railroad Commission. The production forecasts were filed by various Texas gas producers and formed the basis on which the Railroad Commission allocated production quotas. The plaintiff alleged that the submission of false forecasts caused a reduction in the amount of gas which the plaintiff was allowed to produce.

The Fifth Circuit held that the plaintiff stated a cause of action under state and federal antitrust laws based on the false

testimony presented to the Texas Railroad Commission. Again, the court was concerned with protecting the integrity of an administrative agency:

> ". . . [I]n the case at hand there is an allegation that the Commission's production allowable order rested upon false facts adduced by defendants. There was, moreover, no opportunity for meaningful supervision or verification. Because of the amount and character of nomination predictions, the Railroad Commission of necessity must rely on the truthfulness of the gas producers. Such facts are usually in the exclusive control of those producers, so the final order of the Commission often must accept the nomination at face value." 438 F.2d at 1295.

The facts of the instant action bear a striking resemblance to *Woods*. The false and misleading testimony of Celanese related to its undisclosed intentions to build methanol producing facilities and to its estimates for the demand for methanol during the 1980's. These facts were within the "exclusive control" of Celanese and could not be "verified" by the Commission which, like the Railroad Commission in *Woods*, must rely on the truthfulness of industry members in making its determination.

Alberta Gas has, like the plaintiff in *Woods*, alleged that the Commission would not have found a likelihood of future injury to the United States methanol producing industry had Celanese testified truthfully. Alberta Gas has also alleged that it was injured as a result of Celanese's actions. Finally, Alberta Gas has alleged that Celanese committed fraud for anticompetitive purposes. In short, the facts alleged in the Alberta Gas complaint are, in all respects, virtually identical to the facts in *Woods*.

The opinions of the Fifth, Ninth and District of Columbia Circuits in *Woods*, *Clipper Exxpress* and *Israel* are well-reasoned and eminently correct. The decision below, which is not supported by a formal opinion, is clearly incorrect. Under the rule of law adopted by the Second Circuit, Alberta Gas and

companies similarly victimized are denied any remedy for damages intentionally inflicted upon them by companies which fraudulently misrepresent undiscoverable facts to federal administrative agencies. That rule grants practical immunity to companies committing such fraud and consequently encourages the commission of such fraud on administrative agencies. This Court should exercise its jurisdiction to invalidate the rule of law adopted by the Second Circuit and make the law in this critically important area uniform throughout the Circuits.

II

IF THE SECOND CIRCUIT MEANT THAT THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION, THAT DECISION WAS INCORRECT AND IS IN DIRECT CONFLICT WITH DECISIONS OF OTHER CIRCUITS AND THIS COURT

The first District Court opinion, which was approved by the Second Circuit, stated that "[e]ven if plaintiff's complaint stated a cause of action" the court's jurisdiction over the Alberta Gas complaint "seems dubious" because Congress has "granted to the Customs Court [now the Court of International Trade] 'exclusive jurisdiction' over actions challenging orders or findings made in the administrative process." 497 F.Supp. at 640 (App. A., pp. A-5-6). It is clear, however, that Alberta Gas is not challenging the determination of the Commission (which has been reversed) and that Congress never granted the Court of International Trade the authority to entertain a private damage action for fraud.

The jurisdiction of the Court of International Trade was limited solely to a determination of whether the Commission's injury determination was supported by substantial evidence on the record. *Alberta Gas Chemicals, Inc.* v. *United States,* 515 F.Supp. 780, 789 (U.S.C.I.T. 1981). The truth or falsity of the evidence (much of which was nonpublic) was not within the scope of that review. (Nor has the Court of International Trade any jurisdiction, under any circumstances, to award damages to a person injured by false testimony.)

In *Clipper Exxpress,* the proponent of a new tariff had ultimately prevailed before the ICC in the face of the defendants' fraudulent protests. The Ninth Circuit recognized that the ICC had exclusive authority to set rates, but there was no applicable ICC remedy to recover the damages caused by the defendants' protests. It differentiated the plaintiff's action from a challenge to the legality of a rate approved by the ICC and upheld the jurisdiction of the District Court.

In *Israel* v. *Baxter Laboratories, Inc., supra,* the plaintiffs alleged that the defendants had improperly influenced the Food and Drug Administration to deny fair consideration to the plaintiffs' drug application. The Court of Appeals for the District of Columbia, in remanding the action to the District Court, carefully distinguished between the plaintiffs' right to a review based on the substantial evidence standard and the plaintiffs' right to an independent action based on the alleged impropriety, and it preserved both rights. In the present case, Alberta Gas's right to a review based on a lack of substantial evidence has been successfully exercised, but its right to recover for damages caused by Celanese's fraud has been taken away as a result of the Second Circuit's confusion of the two rights.

This Court has long recognized that distinction. *American Well Works Co.* v. *Layne & Bowler Co.,* 241 U.S. 257 (1916), involved a claim of unfair competition based upon allegedly false charges of patent infringement. This Court (Holmes, J.) held that jurisdiction in the state court was proper and stated:

> "A suit for damages to business caused by a threat to sue under the patent law is not itself a suit under the patent law. And the same is true when the damage is caused by a statement of fact,—that the defendant has a patent which is infringed. What makes the defendants' act a wrong is its manifest tendency to injure the plaintiff's business; and the wrong is the same whatever the means by which it is accomplished. But whether it is a wrong or not depends upon the law of the state where the act is done, not upon the patent law, and therefore the suit arises under the law of the state. A suit arises under the law that creates a cause

of action. The fact that the justification may involve the validity and infringement of a patent is no more material to the question under what law the suit is brought than it would be in an action of contract." *Id.* at 259-60.

Similarly, the suit by Alberta Gas is not a suit "arising under" the customs laws (it is a suit for fraud and unfair competition), and the District Court clearly has diversity jurisdiction to hear the claim. Access to the District Courts should be given to Alberta Gas (and companies similarly situated) in order to provide such companies with a remedy for damages intentionally inflicted upon them through fraudulent testimony presented to federal administrative agencies and to deter companies from committing such fraud upon those agencies.

CONCLUSION

For the foregoing reasons, petitioner repectfully prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALBERTA GAS CHEMICALS, LTD., *Plaintiff,* v. CELANESE CORPORATION AND CELANESE CHEMICAL COMPANY, INC., *Defendants.*	MEMORANDUM OPINION AND ORDER 80 CIV. 1855 (ADS)

ABRAHAM D. SOFAER, D. J.:

In this diversity action, Alberta Gas Chemicals, Ltd. ("Alberta Gas") sues for alleged fraud and unfair competition by Celanese Chemical Co., Inc. ("Celanese"), a wholly owned subsidiary of Celanese Corp. Alberta Gas is Canada's largest producer of methanol; Celanese is the largest producer of methanol in the United States. Alberta Gas claims that Celanese engaged in "an unlawful scheme and plan designed, among other things, to delay or prevent Alberta Gas from constructing additional facilities to produce methanol" in Canada and to reduce plaintiff's capacity to compete with Celanese. (Complaint ¶ 8.) The alleged scheme consists entirely of Celanese's conduct at a hearing before the United States International Trade Commission ("Commission"), held to determine whether imports of methanol from Canada were injuring, or were likely to injure, the domestic methanol-producing industry.

Specifically, Celanese is alleged to have "intentionally presented materially false and misleading testimony to the

Commission relating to the principal issues before the Commission, including (i) the failure to disclose Celanese's plans for the substantial expansion of its . . . methanol producing facilities in Alberta and the United States, and (ii) the projected demand for methanol." (Complaint ¶ 8.) Celanese allegedly failed to tell the Commission that it was planning to construct extensive new facilities to produce methanol. (Complaint ¶ 9.) Moreover, Celanese testified that demand for methanol would increase in the United States during the 1980's at a rate no greater than 6% to 7%, whereas it allegedly "believed at the time . . . that the demand for methanol in the United States during that period would increase at a rate of at least 10% per annum." (Complaint ¶ 10.)

The Commission concluded unanimously that imports of methanol from Canada were not currently injuring the domestic methanol-producing industry, but determined by a vote of three to two that Canadian imports were likely to injure the industry in the future. Once the Commission made its finding of possible future harm, the Treasury Department was required to issue a so-called Finding of Dumping under the Anti-Dumping Act of 1921, 19 U.S.C. §§ 160-171. The effect of this finding was to subject future imports of Canadian methanol to a special dumping duty.

Plaintiff's claim of injury and prayer for relief rest ultimately on its allegation that "[u]pon information and belief, had Celanese Chemical stated the truth as it was known to it with respect [to its expansion plans] and the demand for methanol in the United States, the Commission would not have found that there was a likelihood of future injury to the United States methanol industry by reason of the sale of methanol to the United States by Alberta Gas." (Complaint ¶ 11.) Alberta's alleged injuries have resulted solely from the Commission's determination, so for plaintiff to succeed that determination must be shown to have been caused by Celanese's alleged misrepresentations.

Defendant Celanese moves to dismiss the complaint on three grounds: (1) lack of jurisdiction; (2) failure to exhaust

administrative remedies; and (3) failure to state a cause of action. All three contentions seem meritorious, but dismissal is now granted for plaintiff's failure to state a cause of action.

Under New York law, "a plaintiff who has lost his case because of perjured testimony cannot sue the perjurer for damages." *Anchor Wire Corp.* v. *Borst*, 277 App. Div. 728, 729, 102 N.Y.S.2d 871, 872 (1st Dep't 1951). Indeed, the rule is universally recognized as necessary to prevent matters from being endlessly relitigated. "Thus, the losing party's remedy is limited to a direct appeal in the case where the alleged perjury occurs." *Newin Corp.* v. *Hartford Accident & Indemnity Co.*, 37 N.Y.2d 211, 217, 371 N.Y.S.2d 884, 889-90, 333 N.E.2d 163, 166 (1975). *See Generally* 70 C.J.S. *Perjury* ¶ 92 (1951 & Supp. 1979); Annot., 54 A.L.R.2d 1298 (1957 & Supp. 1978).

Plaintiff correctly asserts an exception to this rule "where the perjury is merely a means to the accomplishment of a larger fraudulent scheme." *Newin Corp.* v. *Hartford Accident & Indemnity Co., supra*, 37 N.Y.2d at 217, 371 N.Y.S.2d at 890, 333 N.E.2d at 166. The " 'compelling policy that fraud be frustrated [requires] . . . that one who defrauds not gain sanctuary merely because a narrow issue, by very reason of his fraud, has been determined in his favor. If the total objective of the scheme was the determined issue, then there is a bar; but if the total objective was greater than the determined issue, and the determined issue was but a step or a part of the total objective, then there is no bar.' " 37 N.Y.2d at 218, 371 N.Y.S.2d at 890, 333 N.E.2d at 167 (quoting *Burbrooke Manufacturing Co.* v. *St. George Textile Corp.*, 283 App. Div. 640, 643-44, 129 N.Y.S.2d 588, 592 (1st Dep't 1954) (Breitel, J.)).

Plaintiff fails to come within this exception. It alleges that defendant's conduct at the Commission also was intended "to delay or prevent Alberta Gas from constructing additional facilities to produce methanol in Alberta . . . ." (Complaint ¶ 8.) But this allegation is insufficient to create a larger scheme of which the perjury was merely a part. The larger scheme

must entail some conduct on the tortfeasor's part other than simply the perjury itself. Even if Celanese offered perjured testimony to injure Alberta Gas, it did nothing else; and all the consequences of what it did resulted from its conduct before the Commission and from the Commission's finding. As in *Levy* v. *Hayward*, 248 F.2d 152, 153 (D.C. Cir. 1957) (per curiam), *cert. denied*, 356 U.S. 941 (1958), defendant's alleged fraud involved no "fraudulent conduct beyond the giving of false testimony." *Cf. Woods Exploration & Producing Co.* v. *Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972) (perjury part of broader antitrust conspiracy). In fact, plaintiff was offered the opportunity at oral argument to amend the complaint so as to allege fraudulent conduct other than the perjury, but declined to do so.

Perhaps recognizing that it fails to allege additional fraudulent conduct, plaintiff interprets New York law to permit a suit if the injured party had no effective remedy at the earlier proceeding, because the new claim is broader than or different from the claim in the prior proceeding. But *Newin* stands for no such broad proposition. *Newin* was a fraud action in which plaintiffs were beneficiaries of an excess liability insurance policy and claimed that, by procuring perjured testimony, the primary insurer effectuated a settlement for an amount less than the primary coverage. Apparently, no fraudulent conduct was alleged in addition to the conduct that had occurred at the earlier action.[1] But the plaintiffs in the succeeding action—unlike the plaintiff here—were not parties to the original action in which the perjury took place and therefore "had no effective remedy in the prior action." 37 N.Y.2d at 218, 371 N.Y.S.2d at 891, 333 N.E.2d at 167. Plaintiffs in *Newin* had in fact objected at the earlier proceeding to the bankruptcy referee's approval of the settlement allegedly procured by fraud, but the referee "refused to make any finding on the validity of the plaintiffs' fraud charges." 37 N.Y.2d at 215, 371

[1] *But see* 37 N.Y.2d at 218 n.*, 371 N.Y.S.2d at 890 n.*, 333 N.E.2d at 167 n.* (plaintiffs allege conspiracy "to create such a hiatus between settlement and coverage. . . as to frustrate payment").

N.Y.S.2d at 887, 333 N.E.2d at 165. *Newin* would therefore appear to preclude a collateral attack on the bankruptcy referee's findings by any party who had the opportunity to claim fraud at those proceedings and did not do so, or in cases in which the issue of fraud was resolved as a result of a party's claim.

If *Newin* could be read as expansively as plaintiff claims, then it could not be followed in the federal courts, and its application in the state courts might well be preempted in cases that are essentially collateral attacks on determinations made by federal agencies or courts under grants of specific and exclusive jurisdiction. The scope and effect of a federal decree is governed by federal law. *See Nichols* v. *Alker*, 231 F.2d 68, 75 (2d Cir.), *cert. denied*, 352 U.S. 829 (1956).[2] The sole issue that would be placed before the state courts under plaintiff's complaint, or before this Court in diversity, is whether the Commission's determination was properly reached. The effect of plaintiff's succeeding in its claim for damages would be to shift from Alberta Gas to Celanese the cost of the dumping duties imposed by the Commission upon Alberta Gas. This would undermine the purpose of the Commission's order, designed as it was to prevent Alberta Gas from harming the American methanol industry, including Celanese. Alberta Gas would not be deterred by the duties, as the Commission intended; and Celanese would not be protected. As for plaintiff's other claims for equitable relief, their obvious purpose is to obtain decrees or orders that would further nullify the Commission's determination.

Even if plaintiff's complaint stated a cause of action, this Court's jurisdiction over this dispute seems dubious. Congress has created a detailed and comprehensive administrative scheme by which to regulate "dumping" of foreign products in this nation, and it has granted to the Customs Court "exclusive

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[2] In *Nichols*, Judge Frank clearly stated the rule that a subsequent damage action based on perjury is only permitted when the perjury is "but an incident" to a larger fraudulent scheme. 231 F.2d at 80-81 (concurring opinion).

jurisdiction" over actions challenging orders or findings made in the administrative process. *See generally SCM Corp.* v. *United States,* 450 F. Supp. 1178 (Cust. Ct. 1978); 28 U.S.C. § 1582(a).[3] The proper statutory procedure for challenging the Treasury's Finding of Dumping is to protest the payment of any dumping duty imposed and to commence an action in Customs Court if the protest is denied. Alberta Gas filed such a protest on August 20, 1979, raising in general terms the contention that the Commission's finding of possible future injury was invalid and void, but failing to assert in any detail the claim that the Commission relied on false testimony. *Alberta Gas Chemicals, Inc.* v. *United States,* Civ. No. 79-8-01295 (Cust. Ct.), reprinted in Defendant's Memorandum of Law, App. D.

Plaintiff replies that this case arises under the law of fraud and unfair competition and seeks remedies (damages) unavailable under the Anti-Dumping Act. This argument is disingenuous. Plaintiff seeks more than just damages in this case. It seeks equitable relief, presumably including at least a declaration that the Commission was misled by false testimony and would have reached a different result but for that testimony. Moreover, the claim for damages might be mooted if the Commission's determination were changed, since plaintiff's damages apparently all result from the Commission's decision. In any event, even if this case could be distinguished on the basis of the relief claimed, a state would lack power to create a cause of action based solely upon the allegedly erroneous action of a federal agency—especially if that agency's action was not yet final. Any challenge to the Commission's findings must, by statute, be brought in the Customs Court.

Finally, even if plaintiff stated a cause of action and this Court had jurisdiction over it, the doctrine of primary jurisdiction would constrain us from hearing the case at this time. The central issue in this case is whether, but for Celanese's alleged

[3] An earlier effort by plaintiff to circumvent established statutory procedures was rejected by the Customs Court. *Alberta Gas Chemicals, Inc.* v. *Blumenthal,* 467 F. Supp. 1245 (Cust. Ct. 1979).

misrepresentations, the Commission would have refused to impose dumping duties upon Alberta Gas. Rather than second-guessing the Commission, we would stay action pending the Commission's redetermination of its decision. A finding by the Commission that its order was appropriate despite the purported misrepresentations would preclude plaintiff from establishing the requisite causation. *See generally Far East Conference* v. *United States,* 342 U.S. 570, 574-75 (1975); *Aircraft & Diesel Equipment Corp.* v. *Hirsch,* 331 U.S. 752, 767-68 (1947). The claim that, by placing perjured testimony before the Commission, Celanese caused it to reach an erroneous result belongs in the federal administrative process, although the Department of Justice is also empowered to act if it is satisfied that perjury occurred in a federal proceeding. *See* 18 U.S.C. §§ 1001, 1621.

The complaint is therefore dismissed for failure to state a claim on which relief may be granted. Fed. R. Civ. P. 12(b)(6).

SO ORDERED.

Dated: New York, New York
October 6, 1980.

/s/ ABRAHAM D. SOFAER

Abraham D. Sofaer
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 782, Docket 80-9021

(Argued February 26, 1981 Decided May 12, 1981)

ALBERTA GAS CHEMICALS, LTD.,

Plaintiff-Appellant,

V.

CELANESE CORPORATION and
CELANESE CHEMICAL COMPANY, INC.,

Defendants-Appellees.

Before:

FEINBERG, *Chief Judge,* OAKES, *Circuit Judge,*
and MOTLEY, *District Judge**

* Honorable Constance Baker Motley, United States District Judge, Southern District of New York, sitting by designation.

FEINBERG, Chief Judge:

This appeal raises unusual issues regarding the power of an administrative agency to insure the integrity of proceedings before it. Alberta Gas Chemicals, Ltd. (Alberta), a Canadian corporation, appeals from a judgment of the United States District Court for the Southern District of New York, Abraham D. Sofaer, J., dismissing Alberta's complaint against Celanese Corporation and Celanese Chemical Company, Inc., 497 F.Supp. 637 (collectively referred to as Celanese). The complaint alleged that Celanese had perpetrated a scheme to defraud and unfairly compete with Alberta by interfering with its construction of new facilities in Canada, and by hindering its efforts to sell methanol in the United States.[1] The gravamen of the complaint was that Celanese presented false testimony before the United States International Trade Commission (Commission), which was considering whether imports from Canada were injuring, or were likely to injure, the domestic methanol producing industry. On Celanese's motion, Judge Sofaer dismissed Alberta's complaint. As indicated below, we adopt one of the alternate grounds indicated in the opinion of the district court, and remand this case to the district court to be held pending further proceedings in accordance with this opinion.

I

The relevant facts may be simply stated: In March 1979, the Treasury Department concluded that Canadian methanol, exported by Alberta, was being sold in the United States at less than fair value. 44 Fed.Reg. 19,090 (March 30, 1979). This triggered hearings before the Commission in May 1979 pursuant to the Antidumping Act, 19 U.S.C. § 160 et seq., to determine whether the sale here of the Canadian methanol at less than fair value was likely to injure the American methanol

[1] Methanol is an organic chemical used primarily in manufacturing other chemicals and as a solvent.

industry.[2] At the hearing, the Commission received oral and written testimony from many of those involved in the American methanol industry, including employees of Celanese, this country's largest producer. 44 Fed.Reg. 40,734—35 (July 12, 1979).

In June 1979, the Commission decided by a 3-2 vote that the sale in this country of Canadian methanol was likely to be detrimental to domestic producers in the future. This finding of possible future harm required the Treasury Department to issue a Finding of Dumping under 19 U.S.C. § 160(a), thus subjecting future imports of Canadian methanol to a special antidumping duty. See 44 Fed. Reg. 44,154 (July 27, 1979). In August 1979, Alberta challenged this determination by filing an action in the United States Court of International Trade.[3]

According to Alberta, it discovered in November 1979 that Celanese employees had perjured themselves in the antidumping proceeding before the Commission by failing to disclose Celanese's plans to expand substantially its methanol producing facilities in Canada and in the United States, and by deliberately underestimating the projected United States demand for methanol. By the time Alberta allegedly discovered this perjury, it had already filed its action in the Court of International Trade, as indicated above. Nevertheless, Alberta did not utilize this information in connection with its case pending there. Nor did Alberta call the alleged perjury to the attention of the Commission. Instead, it filed the present action in April 1980 in the Southern District basing jurisdiction on diversity. Alberta, as already indicated, alleged that Celanese was engaged in an unlawful scheme to hinder Alberta's efforts to

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[2] The antidumping provisions now appear as part of the Tariff Act of 1930, 19 U.S.C. § 1671 et seq. Because the proceedings at issue here were conducted under the old law, we will refer throughout this opinion to the provisions of the Antidumping Act.

[3] Since the district court filed its opinion, the United States Customs Court has been renamed the United States Court of International Trade. See Customs Courts Act of 1980, Pub. L. No. 96—417 (Oct. 10, 1980). For purposes of clarity, we will refer to the court as the Court of International Trade.

produce methanol in Canada and to sell it in the United States, of which the perjury before the Commission was an integral part. The complaint further alleged that the Commission would not have concluded that future importation of Canadian methanol was likely to hurt domestic producers but for the perjured testimony. The complaint prayed for an injunction requiring Celanese to disclose the true facts to the Commission, and also sought damages, both compensatory and punitive.

In its answer, Celanese denied the essential allegations of the complaint, including the perjury, and moved for judgment on the pleadings. Celanese asserted in the alternative that the district court either lacked jurisdiction, or should not exercise its jurisdiction, and that even if the court did reach the merits, the complaint did not state a claim upon which relief could be granted. In a memorandum opinion and order dated October 8, 1980, Judge Sofaer concluded that under federal law, appellant's complaint failed to state a cause of action because it did not allege any wrongful conduct on the part of Celanese other than the alleged perjury before the Commission. The judge went on to say that even if the complaint did state a cause of action, the federal court's jurisdiction over the dispute seemed "dubious" because the matter was within the exclusive jurisdiction of the Court of International Trade; finally, the court noted that under the doctrine of primary jurisdiction the issues relating to Celanese's conduct during the hearing before the Commission should be resolved, in the first instance, by the Commission. This appeal followed.

II

Based upon the foregoing, the parties have presented and thoroughly briefed a number of legal issues, but we do not find it necessary or appropriate to reach most of them. It is quite clear to us that Alberta is trying to obtain a reversal of the Commission's ruling without bothering to attempt to utilize other remedies available to it, and we see no reason to countenance such use of the federal courts.

The claimed perjurious testimony by Celanese related to its plans to expand its methanol production capacity and to its estimate of demand for methanol in the United States. The district court found that the "central issue" in this litigation was whether "but for Celanese's alleged misrepresentations, the Commission would have refused to impose dumping duties on Alberta Gas." Alberta disputes this, arguing that a decision in its favor in this lawsuit would not affect the Commission's determination that imports of Canadian methanol were likely to injure the American methanol industry. Whether or not this is so—and it seems unlikely—the only specific fraudulent action that Alberta asserted in the district court was the alleged perjury before the Commission.[4] Moreover, to prove that it suffered damage from the alleged perjury, Alberta must show that this testimony influenced the Commission to come to a result it would not otherwise have reached. Without that connection, Alberta's damages would be caused by the legitimate action of the Commission, and not by the allegedly tortious conduct by Celanese.

Under the circumstances, it makes good sense to allow the Commission to determine initially whether there was perjury and if there was, whether the perjury affected the result before the Commission. There can be little doubt that the Commission's "insight gained through experience," *Far East Conference v. United States,* 342 U.S. 570, 574-75, 72 S.Ct. 492, 494-495, 96 L.Ed. 576 (1952), will be helpful in determining whether Celanese employees misrepresented the estimated United States demand for methanol and Celanese's intentions

[4] In its brief and argument before this court, Alberta asserted that Celanese had in 1976 "vigorously opposed" Alberta's application to build a methanol production facility in Canada, and that some "90 days after the Commission's decision" in 1979, in an application to the Alberta Energy Resources Conservation Board, Celanese had made a "complete reversal" of its earlier estimate of the demand for methanol in the United States. Celanese alleges that neither of these arguments was presented to the district court. Even if properly before us, however, these allegations do not change the focus of the complaint on the alleged perjury before the Commission.

concerning the construction of additional production facilities. Resolution of such questions will be materially aided by the Commission's knowledge of how such estimates and projections are customarily calculated, utilized, and revised, by its intimate familiarity with the record of the entire antidumping proceeding, and by its expertise in the field of international commerce. Moreover, the Commission will certainly be in a far better position than the district court to determine whether it would have reached a different conclusion but for the allegedly perjured testimony. Indeed, appellant does not seriously argue that the Commission would not be in a better position than the district court to resolve these issues initially. Rather, appellant contends that the Commission lacks the authority either to reconsider its decision or to grant the relief Alberta seeks in this action. We find both arguments without merit.

Alberta contends that the Commission cannot reconsider a prior determination on the basis of newly discovered facts, if they existed at the time of the initial decision. Appellant claims that the Commission regulations that deal with altering or amending a prior determination apply only when circumstances have changed since the initial decision, or to correct technical errors. 19 C.F.R. §§ 207.45–46. Whether or not this construction of the regulations is correct, a more fundamental source of authority exists for allowing the Commission to determine initially the issues in this litigation: the inherent power of any administrative agency to protect the integrity of its own proceedings.

"The inherent power of a federal court to investigate whether a judgment was obtained by fraud, is beyond question." *Universal Oil Co. v. Root Refining Co.*, 328 U.S. 575, 580, 66 S.Ct. 1176, 1179, 90 L.Ed. 1447 (1946). The Court there cited *Hazel-Atlas Co. v. Hartford Co.*, 322 U.S. 238, 64 S.Ct. 997, 88 L.Ed. 1250 (1943), in which the Court stated, "[t]his equity rule, which was firmly established in English practice long ago before the foundation of the republic, . . . [was] developed and fashioned to fulfill a universally recognized need for correcting injustices which . . . are deemed sufficiently gross

to demand a departure from rigid adherence to . . . the rule [of finality]." Id. at 244, 64 S.Ct. at 1000. See also 7 Moore's Federal Practice ¶ 60.16[5] at 88–90 (1979). This inherent power has been confirmed by the Federal Rules of Civil Procedure. See Fed.R.Civ.P. 60(b); 7 Moore's Federal Practice ¶ 60.33.

This universally accepted rule has been applied to proceedings before federal administrative agencies. Professor Davis states that "[e]very tribunal, judicial or administrative, has some power to correct its own errors or otherwise appropriately to modify its judgment, decree, or error." 2 K. Davis, Administrative Law Treatise § 18.09 at 606 (1958). As the Court of Claims has pointed out, "it is often the case that reconsideration of a prior decision, within a reasonable period of time, is absolutely essential to the even administration of justice. . . . [I]t may be imperative for the tribunal to consider new developments or newly discovered evidence in order to facilitate the orderly and just resolution of conflict. More frequently, reconsideration is often the sole means of correcting errors of procedure or substance." *Bookman v. United States*, 453 F.2d 1263, 1265 (Ct.Cl. 1972). See also *United States v. Sioux Tribe*, 616 F.2d 485, 493 (Ct.Cl.), *cert. denied*, 446 U.S. 953, 101 S.Ct. 2716, 65 L.Ed.2d 844 (1980) ("It is a well established principle that an administrative agency may reconsider its own decisions. 'The power to reconsider is inherent in the power to decide.' ").

It is hard to imagine a clearer case for exercising this inherent power than when a fraud has been perpetrated on the tribunal in its initial proceeding. In *Greene County Planning Board v. Federal Power Commission*, 559 F.2d 1227, 1233 (2d Cir. 1976), *cert. denied*, 434 U.S. 1086, 98 S.Ct. 1280, 55 L.Ed.2d 591 (1978), we stated that "an agency does have an obligation to make corrections when it has been relying on erroneous factual assumptions . . . ." See also *Hudson River Fishermen's Association v. Federal Power Commission*, 498 F.2d 827, 833-34 (2d Cir. 1974). Here, according to Alberta's allegations, the Commission relied on "erroneous factual

assumptions" that were deliberately presented by Celanese's witnesses to persuade the Commission to reach an incorrect conclusion concerning the possible future effects of the importation of Canadian methanol. The public interest in preventing perjury is obvious; and there is also a clear public interest in a correct determination of whether imports of methanol should be restricted, since the restrictions will almost certainly affect the price American consumers pay for this product. These considerations far outweigh any interest in the finality of the Commission's initial determination, particularly when the Commission's decision is still pending before the Court of International Trade.

Alberta's other objection to requiring it to seek relief initially from the Commission is that the Commission has no power to award damages. This argument misperceives the nature of the doctrine of primary jurisdiction. As Professor Davis points out, "[t]he test is not whether some parts of the case are within the exclusive jurisdiction of the courts; the test is whether some parts of the case are within the exclusive jurisdiction of the agency. Because of the purpose of the doctrine—to assure that the agency will not be by-passed on what is especially committed to it—and because the resort to the courts is still open after the agency has acted, the doctrine applies even if the agency has no jurisdiction to grant the relief sought." *Davis, supra,* § 19.07 at 39. The Supreme Court has consistently followed this approach by remanding cases for initial resolution by administrative agencies, when it was undisputed that those agencies did not have the power to award the damages sought in the federal court action. See, e.g., *Thomson* v. *Texas Mexican Railway,* 328 U.S. 134, 66 S.Ct. 937, 90 L.Ed. 1132 (1946); *General American Tanker Corp.* v. *El Dorado Terminal Co.,* 308 U.S. 422, 60 S.Ct. 325, 84 L.Ed. 361 (1940); *United States* v. *Interstate Commerce Commission,* 337 U.S. 426, 464, 69 S.Ct. 1410, 1430, 93 L.Ed. 1451 (1949) (Frankfurter, J., dissenting).

We find no reason, therefore, not to give the Commission the opportunity to resolve in the first instance the major issues

in this litigation. We believe that the Commission's decision as to whether Celanese employees perjured themselves before the Commission, and if so, whether but for such perjury the Commission would have reached a different result, will materially affect, or perhaps even definitively conclude, the federal action now before us. In light of our disposition of this case, we find it unnecessary to address appellee's argument that this matter falls within the exclusive jurisdiction of the Court of International Trade, or the district court's conclusion that apppellant failed to state a cause of action.

The case is remanded to the district court with instructions to stay all proceedings before it until such time as the Commission determines whether (1) Celanese employees did commit perjury during the Canadian methanol proceeding, and (2) whether but for such perjury, the Commission would have reached a different conclusion regarding the possible future effects of the importation of Canadian methanol.

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALBERTA GAS CHEMICALS, LTD., *Plaintiff,* v. CELANESE CORPORATION AND CELANESE CHEMICAL COMPANY, INC., *Defendants.*	ORDER 80 CIV. 1855 (ADS)

ABRAHAM D. SOFAER, D.J.:

Pursuant to and on the basis of the order of the Court of Appeals dated May 12, 1980, this action is hereby stayed and placed on the suspense calendar of this court "until such time as the Commission determines whether (1) Celanese Employees did commit perjury during the Canadian methanol proceeding, and (2) whether but for such perjury, the Commission would have reached a different conclusion regarding the possible future effects of the importation of Canadian methanol."

SO ORDERED.

Dated: New York, New York
July 6, 1981

/s/ ABRAHAM D. SOFAER

Abraham D. Sofaer,
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALBERTA GAS CHEMICALS, LTD., *Plaintiff,* v. CELANESE CORPORATION and CELANESE CHEMICAL COMPANY, INC., *Defendants.*	MEMORANDUM OPINION AND ORDER 80 CIV. 1855 (ADS)

ABRAHAM D. SOFAER, D.J.:

Plaintiff's motion to restore this case to the Court's active calendar and to vacate the current stay is granted. On October 10, 1980, the complaint in this case was dismissed for failure to state a claim on which relief could be granted in an opinion that also strongly suggested a lack of jurisdiction. 497 F.Supp. 637 (S.D.N.Y.1980). The opinion further stated that, even if the Court had jurisdiction, the doctrine of primary jurisdiction would preclude its exercise. On May 12, 1981 the Second Circuit issued its opinion on appeal. Without addressing the question of jurisdiction, the Court reversed, invoking the doctrine of primary jurisdiction as a basis for obtaining a determination on plaintiff's claims by the United States International Trade Commission. 650 F.2d 9 (2d Cir. 1981).

On June 17, 1981, plaintiff petitioned the Commission for the determinations suggested by the Court of Appeals. Meanwhile, however, the Commission ruling which had prejudiced plaintiff was reversed by the Court of International Trade, in which decision the Commission acquiesced. *Alberta Gas Chemicals, Inc.* v. *United States,* 515 F.Supp. 780 (U.S.C.I.T. 1981). In August 1981, the Commission refused to entertain plaintiff's

application, reasoning that the reversal of the Commission's order against plaintiff had corrected the injury plaintiff allegedly had suffered. In addition, the Commission held that it lacked authority to conduct a proceeding to determine whether, as plaintiff alleged, the defendants had committed perjury, because that was a criminal charge over which only the Department of Justice had jurisdiction. Consequently, while the Commission dismissed the petition, it referred the charge to the Department of Justice for possible prosecution.

Defendants have cross-moved for judgment on the pleadings, and for dismissal. Nothing in the ruling of the Court of Appeals suggests any reason to correct the grounds relied upon in dismissing plaintiff's complaint. The defendants' motion for judgment on the pleadings is granted, and the complaint is dismissed, for the reasons stated in the opinion reported at 497 F.Supp. 637. Fed. R. Civ. Proc. 12(b)(1) and 12 (b)(6).

SO ORDERED.

Dated: New York, New York
December 11, 1981

/s/ ABRAHAM D. SOFAER

Abraham D. Sofaer
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 28th day of May one thousand nine hundred and eighty-two.

Present:

HONORABLE WILFRED FEINBERG
Chief Judge

HONORABLE J. EDWARD LUMBARD
HONORABLE JON O. NEWMAN
Circuit Judges.

ALBERTA GAS CHEMICALS, LTD.

Plaintiff-Appellant,

—against—

CELANESE CORPORATION AND
CELANESE CHEMICAL COMPANY, INC.

Defendants-Appellees.

82-7041

N.B. SINCE THIS STATEMENT DOES NOT CONSTITUTE A FORMAL OPINION OF THIS COURT AND IS NOT UNIFORMLY AVAILABLE TO ALL PARTIES, IT SHALL NOT BE REPORTED, CITED OR OTHERWISE USED IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is AFFIRMED on the basis of Judge Sofaer's opinion dated December 11, 1981, which incorporates the reasons stated in his opinion dated October 6, 1980, reported at 497 F. Supp. 637. Costs are awarded to appellee.

/s/ WILFRED FEINBERG,
Chief Judge

/s/ J. EDWARD LUMBARD,

/s/ JON O. NEWMAN,
Circuit Judges.

APPENDIX F

UNITED STATES COURT OF APPEALS
Second Circuit

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 14th day of July, one thousand nine hundred and eighty-two.

ALBERTA GAS CHEMICALS LTD.,

Plaintiff-Appellant,

v.

CELANESE CORPORATION AND CELANESE CHEMICAL COMPANY, INC.,

Defendants-Appellees.

No. 82-7041

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant, Alberta Gas Chemicals, Ltd.

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO, Clerk

by:

/s/ FRANCIS X. GINDHART
Francis X. Gindhart
Chief Deputy Clerk

APPENDIX G

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

ALBERTA GAS CHEMICALS, LTD., *Plaintiff,* v. CELANESE CORPORATION AND CELANESE CHEMICAL COMPANY, INC., *Defendants.*	COMPLAINT 80 CIV. 1855 (ADS)

Plaintiff, Alberta Gas Chemicals, Ltd., by its attorneys, Freeman, Meade, Wasserman & Schneider, complaining of defendants respectfully alleges:

1. Alberta Gas Chemicals, Ltd. ("Alberta Gas") is a corporation organized and existing pursuant to the laws of Canada and maintains its principal place of business in the Province of Alberta. Alberta Gas is the largest Canadian producer of methyl alcohol ("methanol") and is the largest Canadian exporter of methanol to the United States.

2. Upon information and belief, defendant Celanese Corporation ("Celanese") is a corporation organized and existing pursuant to the laws of the State of New York, maintaining its principal place of business at 1211 Avenue of the Americas, New York, New York. Celanese, with its subsidiaries, is the world's largest producer of methanol.

3. Upon information and belief, defendant Celanese Chemical Company, Inc. ("Celanese Chemical") is a corporation organized and existing pursuant to the laws of the State of Texas. Celanese Chemical is licensed and authorized to

conduct business and maintains its principal place of business at 1211 Avenue of the Americas, New York, New York.

4. Upon information and belief, Celanese Chemical is a wholly-owned subsidiary of Celanese and Celanese controls and directs the policies and operations of Celanese Chemical.

5. Jurisdiction of this Court is based on diversity of citizenship (28 U.S.C. 1332). The amount in controversy, exclusive of costs and interest, exceeds $10,000.

FIRST CLAIM FOR RELIEF

6. On May 15 and 16, 1979, pursuant to 19 U.S.C. 160, *et seq.*, hearings were held before the United States International Trade Commission (the "Commission") relating to the importation of methanol from Canada into the United States. The issues before the Commission were whether the sales by Alberta Gas were injuring or likely to injure the United States methanol producing industry. In the proceeding, Celanese Chemical submitted oral and written testimony to the Commission, including testimony concerning the future supply of and demand for methanol in the United States.

7. On June 21, 1979, the Commission unanimously determined that imports of methanol from Canada were not presently injuring the domestic methanol industry. However, the Commission did determine (in a three to two decision) that, based upon the evidence before it, imports of methanol from Canada were likely to injure the domestic methanol producing industry in the future.

8. As part of an unlawful scheme and plan designed, among other things, to delay or prevent Alberta Gas from constructing additional facilities to produce methanol in Alberta, Celanese Chemical intentionally presented materially false and misleading testimony to the Commission relating to the principal issues before the Commission, including (i) the failure to disclose Celanese's plans for the substantial expansion

of its (or its subsidiaries') methanol producing facilities in Alberta and the United States, and (ii) the projected demand for methanol. That testimony was intended to be relied upon by the Commission and to injure Alberta Gas.

9. In response to questioning by the Commission relating to the expansion plans of Celanese and Celanese Chemical, Celanese Chemical deliberately failed to disclose that a subsidiary of Celanese, Celanese Canada Limited, or another subsidiary of Celanese, was planning to construct and operate a $255 million facility for the production of methanol in Alberta, Canada, and that the principal market for that methanol would be the United States. In addition, Celanese Chemical deliberately failed to disclose that Celanese was planning to construct and operate in the United States the world's largest methanol producing facility.

10. Celanese Chemical testified to the Commission that the demand for methanol in the United States would not increase during the 1980's at a rate in excess of 6% to 7% per annum. In fact, Celanese and Celanese Chemical believed at the time said testimony was given that the demand for methanol in the United States during that period would increase at a rate of at least 10% per annum.

11. Upon information and belief, had Celanese Chemical stated the truth as it was known to it with respect to Celanese (and its subsidiaries') plans for the expansion of their methanol producing facilities and the demand for methanol in the United States, the Commission would not have found that there was a likelihood of future injury to the United States methanol industry by reason of the sale of methanol to the United States by Alberta Gas.

12. As a result of the unlawful scheme and plan of Celanese and Celanese Chemical and the materially false and misleading testimony of Celanese Chemical, Alberta Gas has sustained and will sustain substantial and irreparable damage in a number of respects, including, but not limited to, its efforts

to sell methanol in the United States and elsewhere and its ability to expand its production facilities in Alberta, Canada.

13. Plaintiff lacks an adequate remedy at law.

SECOND CLAIM FOR RELIEF

14. Plaintiff repeats and realleges each and every allegation set forth in paragraphs 1 through 12 above as if fully set forth at length hereat.

15. By reason of the unlawful scheme and plan of Celanese and Celanese Chemical and the materially false and misleading statements made by Celanese Chemical, Alberta Gas has sustained damage in a sum to be determined, including, but not limited to, amounts necessary to compensate Alberta Gas for losses sustained in connection with reduced sales of methanol in the United States, liability for special duties on sales of methanol to the United States, loss of business in the United States and elsewhere as a result of damage to Alberta Gas's reputation as a steady source of supply of methanol and further delay in the construction of additional production facilities in Alberta, Canada.

WHEREFORE, plaintiff demands judgment:

(a) On its first claim for relief for a mandatory injunction requiring Celanese and Celanese Chemical to disclose to the United States International Trade Commission the material and truthful facts relating to:

(i) Celanese's plans for the expansion of its methanol producing facilities (and that of its subsidiaries) during the 1980's; and

(ii) Celanese's estimate of demand for methanol in the United States during the 1980's.

(b) On its second claim for relief, damages in a sum to be determined by the Court, including a reasonable award of counsel fees and punitive damages.

(c) The costs and disbursements of this action.

(d) Such other and further relief as to the Court may seem just and proper.

FREEMAN, MEADE,
WASSERMAN &
SCHNEIDER

By /s/ MELVYN FREEMAN
A Member of the Firm

Attorneys for Plaintiff
551 Fifth Avenue
New York, New York 10017
(212) 697-6464

APPENDIX H

UNITED STATES
INTERNATIONAL TRADE COMMISSION
WASHINGTON, D. C. 20436

August 20, 1981

FREEMAN, MEADE, WASSERMAN & SCHNEIDER
Attorneys and Counsellors At Law
90 John Street
New York, New York 10038

Attention: Jack Gumpert Wasserman, Esq.

Re: Action Request No. 81-22:
In the Matter of *Methyl Alcohol From Canada,*
Investigation No. AA1921-202

Dear Mr. Wasserman:

This letter is to advise you of the Commission's decision and the action to be taken with respect to the petition of Alberta Gas Chemicals, Ltd. and Alberta Gas Chemicals, Inc. for a determination in conformity with the decision of the United States Court of Appeals for the Second Circuit dated May 12, 1981, *Alberta Gas Chemicals, Ltd. v. Celanese Corporation and Celanese Chemical Company, Inc.*,—F.2d—(2d Cir., Docket No. 80-921).

On August 19, 1981, by a 4-to-0 vote,[1] the Commission denied the petitioners' request for a determination of the issues presented.

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[1] The petition was considered and voted upon by the individual Commissioners in an "action jacket" circulated sequentially (control No. GC-81-093, initiated on July 30, 1981). Ratification of the Commission action taken therein will be by formal vote of the Commissioners as agenda item No. 3 at the Commission meeting on Wednesday, August 26, 1981. *See* 19 C.F.R. § 201.34.

The Commission reached that decision on the basis of several factors. Although the allegations set forth in the petition presented a new (and more indirect) basis for challenging the determination of the likelihood of injury, the Commission concluded that the U.S. Court of International Trade's recent reversal of the contested determination and the Commission's subsequent decision not to appeal that judgment[2] obviated the necessity for reopening the Canadian methanol matter merely for the purpose of deciding—albeit on new grounds—the correctness of what has already been judicially determined to be an erroneous decision. Moreover, the court's reversal and the Commission's acquiescence have effectively rendered the determination in question a nullity; hence, the petitioners no longer have a valid cause of action on the merits of that determination. For those reasons, the Commission declined to determine the materiality of the challenged representations to the majority's conclusion of the likelihood of injury.

Conversely, with respect to the fraud and perjury issues, the Commission concluded that protecting the integrity of its proceedings is a matter of critical importance, and, for that reason, a formal inquiry should be conducted in order to ascertain the truth and veracity of the petitioners' claims. But owing to the nature of the misconduct alleged (*see* 18 U.S.C. §§ 1001 and 1621) and the jurisdictional limitations which constrain the Commission from making findings of fact and conclusions concerning violations of criminal law, the Commission declined to determine the fraud and perjury charges, concluding that a Commission adjudication of such claims would be *ultra vires*.

However, while the Commission is not competent to make the determination requested, the Attorney General of the United States is expressly empowered to appoint officials to

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[2] On July 6, 1981, by a 3-to-0 vote (Commissioner Bedell abstaining), the Commission decided not to appeal the judgment and order of the court. *See* action jacket, control No. GC-81-080, initiated on June 25, 1981.

detect and prosecute crimes against the United States. (*See* 18 U.S.C. § 533.) Consequently, the Commission is referring the petitioners' claims to the United States Department of Justice for investigation by the Criminal Division and such other action as the facts and circumstances may warrant.

Copies of the letters which are being sent to special counsel for the Celanese Corporation and delivered to the Assistant Attorney General are enclosed for your information.

Very truly yours,

/s/ MICHAEL H. STEIN

MICHAEL H. STEIN
General Counsel

Enclosures

cc. James M. Brachman, Esq.
Freeman, Meade, Wasserman & Schneider

Alfred R. McCauley, Esq.
Graubard, Moskovitz & McCauley

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David M. Cohen, Esq., Director
Sheila N. Ziff, Esq., Trial Attorney
The United States Department of Justice
Civil Division
Commercial Litigation Branch

The United States International Trade Commission
The Secretary
Director of Investigations
Office of the General Counsel

Office - Supreme Court, U.S.
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Express Mail

November 16, 1982

Hon. Alexander L. Stevas, Clerk
Office of the Clerk
Supreme Court of the United States
Washington, D.C. 20543

Alberta Gas Chemicals Limited v.
Celanese Corporation, et al.
No. 82-497 (October Term, 1982).

Dear Sir:

I am counsel of record to petitioner Alberta Gas. Its Petition for Certiorari is pending, and the opposing and reply briefs have been filed.

In requesting that certiorari be granted, petitioner points out that there is a conflict between the opinion of the United States Court of Appeals for the Second Circuit in this case and the opinion of the Court of Appeals for the Ninth Circuit in Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc., 674 F.2d 1252 (9th Cir. 1982).

Yesterday, we were advised by the attorneys for the defendants in Clipper Exxpress that they intend to file a Petition for Writ of Certiorari in the Supreme Court by January 3, 1983, in which they will seek review of the decision of the Ninth Circuit.

Since the Court may deem the foregoing to be of interest in its consideration of Alberta Gas's petition, we respectfully request that you bring this letter to the attention of the Court.

Respectfully yours,

James M. Brachman

James M. Brachman

JMB:as
cc: John Asa Rountree, Esq.
Respondents' Counsel of Record
Debevoise & Plimpton
875 Third Avenue
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cc: J. Thomas Rosch, Esq.
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Office - Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-497

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ALBERTA GAS CHEMICALS, LTD.,

Petitioner,

—vs.—

CELANESE CORPORATION and
CELANESE CHEMICAL COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN ASA ROUNTREE, III
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Attorneys for Respondents Celanese Corporation and Celanese Chemical Company, Inc.

November 4, 1982

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Is there a common-law cause of action for damages when the only alleged wrongdoing is perjury by the defendant before the United States International Trade Commission in an antidumping proceeding?

2. Does a United States District Court, in a diversity action, have jurisdiction over a collateral attack on a determination made by the United States International Trade Commission in an antidumping proceeding?

DESIGNATION OF CORPORATE RELATIONSHIPS

Respondent Celanese Corporation has no parent company. Celanese Corporation has the following subsidiaries (other than wholly owned subsidiaries) and affiliates: Acidos, S.A.; Bodegas Industriales, S.A.; Celanese Canada Inc.; Celanese Mexicana, S.A.; Compahnia Alcoalquimica Nacional; Convertidora Textil, S.A.; Convertidores Unidos, S.A.; Copenor-Compahnia Petroquimica do Nordeste; CTE Petrochemicals Company; Derivados Macroquimicos, S.A.; Fenoquimia S.A.; Fiber Industries, Inc.; Fibras Industriales S.A.; H & K Limited; Hager & Kassner do Brasil (Productos Quimicas Ltda. Brazil); Hager & Kassner GmbH; Halocarburos, S.A.; Hindustan Gum & Chemicals Limited; Hopewell International Company Ltd.; Immobiliaria Sercel, S.A.; Impatex A.G.; Indal Industrias de Alfarroba, Ltda.; Induqium S.A. de C.V.; Industrias Quimicas de Mexico, S.A.; Industrias Quimicas Synres, S.A.; JCM Company, Limited; NAGUM-Natural Gum Industry, Ltd.; National Methanol Company; Pace Products Inc.; Pakistan Gum & Chemicals Limited; Polycel de Mexico, S.A.; Polydoublure, S.A.; Polyenvases de Mexico, S.A.; Polyplastics Co., Ltd.; Promociones Sociales Mexicanas, S.C.; Pumyang Industrial Co., Ltd.; Quimica da Bahia Industria e Commercil S.A.; Rayon y Celanese Peruana S.A.; Recuperados de Puebla, S.A.; RV Chemicals, Ltd.; Servicases, S.A.; Tenngasco Gas Gathering Co.; Tereftalatos Mexicanos, S.A.; Ticona Polymerwerke GmbH; UCB Chemicals Corp.; United Insurance Company; Universal Insurance Company of Ireland, Ltd.; Univex, S.A.; Viopol Chemical and Industrial S.A.; and Virchem S.A.

Respondent Celanese Chemical Company, Inc., is a wholly owned subsidiary of Celanese Corporation. Its affiliates (other than wholly owned subsidiaries of Celanese Corporation) are set forth above. The only subsidiary of Celanese Chemical Company, Inc. (other than wholly owned subsidiaries), is Tenngasco Gas Gathering Co.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-497

ALBERTA GAS CHEMICALS, LTD.,

Petitioner,

—vs.—

CELANESE CORPORATION and
CELANESE CHEMICAL COMPANY, INC.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATUTES INVOLVED

Section 1582(a) of the Judicial Code, 28 U.S.C. § 1582(a), which was in effect when this action was commenced, conferred on the United States Customs Court (now known as the United States Court of International Trade) exclusive jurisdiction over all "civil actions" challenging antidumping determinations made by the United States International Trade Commission. The successor to 28 U.S.C. § 1582(a), 28 U.S.C. § 1581(c), which became effective on November 2, 1980, confers such exclusive jurisdiction on the Court of International Trade. The text of these statutes is set forth in Appendix 1 hereto.

COUNTERSTATEMENT OF THE CASE

In this action, petitioner Alberta Gas Chemicals, Ltd. ("Alberta Gas"), seeks damages for alleged perjury before the United States International Trade Commission (the "Commission") by employees of respondent Celanese Chemical Company, Inc., a subsidiary of respondent Celanese Corporation (App. G).[1] (Respondents are collectively referred to herein as "Celanese".) Federal jurisdiction is based solely on diversity of citizenship (App. G-2). No antitrust claim is asserted.

Celanese's alleged perjury occurred during antidumping proceedings relating to Canadian methyl alcohol ("methanol") conducted by the Commission in May 1979, pursuant to the Antidumping Act of 1921, 19 U.S.C. § 160 *et seq.*[2] The result of those proceedings was a determination by the Commission that there was a likelihood that the domestic methanol industry would be injured by sales of Canadian methanol at less than fair value. 44 Fed. Reg. 40,734 (July 12, 1979). That determination was based on testimony from numerous witnesses (including two employees of Celanese), written submissions, answers to questionnaires, personal interviews, and information from other sources. *Id.* at 40,735. The determination did not refer to any testimony by Celanese's employees.

The Commission's determination of likelihood of injury resulted in a Finding of Dumping, which subjected imports of Canadian methanol to antidumping duties. 44 Fed. Reg. 44,154 (July 27, 1979). Alberta Gas was at that time the sole importer of Canadian methanol, and its alleged damages stem from this Finding of Dumping.

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1 Citations in the form "App. G" are to the appendices to Alberta Gas's petition.

2 In 1979, Congress repealed the Antidumping Act of 1921, which governed these proceedings, and amended the Tariff Act of 1930, 19 U.S.C. § 1671 *et seq.*, to include analogous provisions.

On August 20, 1979, Alberta Gas (acting through a subsidiary) commenced an action in the United States Customs Court, pursuant to 28 U.S.C. § 1582, challenging the Finding of Dumping and the Commission's determination of likelihood of injury which had entered into that Finding. This challenge was based on several grounds. Perjury was not one of them. On May 28, 1981, the Customs Court (renamed the Court of International Trade) reversed the Commission's determination on grounds of insufficient evidence. *Alberta Gas Chemicals, Inc. v. United States*, 515 F. Supp. 780 (Ct. Int'l Trade 1981). As a result, the Finding of Dumping was vacated.

In the meantime, on April 2, 1980, Alberta Gas commenced this action in the United States District Court for the Southern District of New York. This was nine months after the Commission's determination and six months after Alberta Gas's purported discovery of perjury by Celanese. At that time, although Alberta Gas's action was pending before the Court of International Trade, Alberta Gas made no attempt to raise the perjury charge before that court.

In the instant action, the complaint alleges that Celanese presented false testimony to the Commission. The alleged perjury was (*i*) that Celanese, in its testimony, projected that the domestic demand for methanol would increase at an annual rate of 7% instead of 10% and (*ii*) that Celanese concealed plans to construct a methanol production facility in Canada (App. G-3). The complaint further alleges that, but for such testimony, the Commission would not have reached its determination that the importation of Canadian methanol at less than fair value was likely to cause injury to the United States methanol industry (App. G-3). This allegation is made despite the fact that neither the Commission's determination nor the opinion of the Court of International Trade mentions the testimony of Celanese and despite the fact, which is made clear by the decision of the Court of International Trade, that neither the testimony given by Celanese nor the information

purportedly withheld by Celanese was harmful to Alberta Gas's position before the Commission.[3]

Celanese answered the complaint, denying that it had committed perjury, and then moved for judgment on the pleadings. On October 8, 1980, the District Court (Sofaer, District Judge) dismissed the complaint on the ground that under common law there is no private damage action for perjury (App. A). The District Court added that subject-matter jurisdiction seemed "dubious" (App. A-5).

On appeal, the Court of Appeals for the Second Circuit held on May 12, 1981, that the Commission had primary jurisdiction of two issues: whether Celanese had committed perjury and, if so, whether, but for such perjury, the Commission would have reached a different determination (App. B). Accordingly, the Court of Appeals remanded the case to the District Court with instructions to stay further proceedings until the Commission had addressed those issues (App. B-9).

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3 The Court of International Trade reversed the determination of the Commission because it was based on two erroneous findings: (*i*) "that there would be no future expansion in the United States consumption of methyl alcohol," 515 F. Supp. at 791, and (*ii*) that there was a likelihood of "expanding supplies of methyl alcohol from Canada." *Id.* at 790. In making the first finding, the Commission either ignored or rejected the testimony of Celanese that U.S. consumption of methanol would rise at an annual rate of 7%. As for the second finding, if Celanese had testified that it planned to construct a facility in Canada and thereby increase Canadian supplies of methanol, such testimony would have supported the Commission's finding.

In view of all this, one might well wonder why Alberta Gas commenced the instant action. The answer may lie in the timing of the commencement of the action. The filing of the complaint, six months after Alberta Gas's "discovery" of the purported perjury, did not coincide with any new event relating to the antidumping proceeding. The filing of the complaint (as well as the publicity given thereto in the Canadian press) *did*, however, coincide with the scheduling in Canada of a hearing on an application by Celanese for a permit to construct a methanol production facility in Canada. Alberta Gas was vigorously opposing that application.

The Court of Appeals explicitly declined to consider whether the complaint stated a claim for relief or whether the District Court had subject-matter jurisdiction (App. B-9).

On June 17, 1981, Alberta Gas filed with the Commission a petition requesting that it address the issues identified by the Court of Appeals (*see* App. D-1). The Commission declined to do so because, by that time, the Commission's determination had been vacated by the Court of International Trade (App. H). The Commission explained that its determination had been "effectively rendered . . . a nullity" by the reversal and vacatur of the Finding of Dumping, thereby "obviat[ing] the necessity for reopening the Canadian methanol matter" (App. H-2).[4] The Commission then referred Celanese's testimony to the Department of Justice for investigation (App. H-3). Upon review, the Department of Justice declined to prosecute.[5]

After the Commission denied Alberta Gas's request for relief, Alberta Gas moved the District Court to lift its stay. Celanese cross-moved for judgment on the pleadings. On December 11, 1981, the District Court dismissed the complaint for failure to state a claim and for lack of subject-matter jurisdiction (App. D). On May 28, 1982, a unanimous panel of the Court of Appeals (Feinberg, Chief Judge, and Lumbard and Newman, Circuit Judges) affirmed (App. E). On July 14,

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4 Alberta Gas's characterization of the Commission's decision as resting "on the ground that the Commission had no procedure to hear" the issue of Celanese's alleged perjury (Petition at 6) is incorrect. The Court of Appeals held that, under the "universally accepted rule" that courts and agencies have the inherent power to protect the integrity of their own proceedings, the Commission was empowered to hear and decide that issue (B-6–B-8). The Commission did not disagree. It simply concluded that there was no need to correct its determination because that determination had been nullified. The Commission then added that it had no jurisdiction to decide whether a crime had been committed before it (App. H-2–H-3).

5 The position of the Justice Department is set forth in a letter of December 4, 1981, a copy of which is Appendix 2 hereto.

1982, rehearing was denied, with no votes in support of rehearing (App. F).

SUMMARY OF ARGUMENT

Alberta Gas's petition for a writ of certiorari should be denied for the following reasons:

1. There is no conflict between the decision by the Court of Appeals and any decision by any other Court of Appeals. This is an action brought at common law to recover damages for alleged perjury. It is not an antitrust action. In affirming the dismissal of the complaint, the Court of Appeals applied the universal common-law rule that there is no private damage action for perjury. The cases now relied on by Alberta Gas construe the scope of the antitrust laws. Those cases are inapposite because Alberta Gas does not allege that Celanese violated the antitrust laws.

2. The Court of Appeals correctly held that the District Court lacked subject-matter jurisdiction over Alberta Gas's action because the Court of International Trade has exclusive jurisdiction over challenges to determinations made by the International Trade Commission. This holding does not conflict with any decision by any other Court of Appeals. This holding also promotes the integrity and efficient operation of the customs tribunals.

ARGUMENT

The case that Alberta Gas seeks to present to this Court is very different from the case that was litigated and decided below. Below, the only substantive issue was whether Alberta Gas had stated a claim for relief in the face of the universal common-law rule prohibiting private damage actions for perjury. Now, for the first time, Alberta Gas presents the case as if it had alleged that Celanese was guilty of an antitrust violation including, among other things, the submission of false infor-

mation to an administrative agency, and as if Celanese were seeking antitrust immunity under the *Noerr-Pennington* doctrine.[6] That is not this case.

I.

The Decision Below Does Not Conflict with Any Decision by Any Other Court of Appeals.

In this action, Alberta Gas alleges that Celanese committed perjury before the Commission. Celanese is charged with no other wrongdoing whatsoever. No violation of the antitrust laws is asserted. Therefore, under the rule prohibiting damage actions for perjury, the complaint fails to state a claim (App. A-3–A-5).

A. The Rule of Law Applied by the Court Below Is Universally Followed.

In holding that Alberta Gas failed to state a claim, the Court of Appeals followed the universal rule that, at common law, "no action lies to recover damages caused by perjury." 70 C.J.S. *Perjury* § 92, at 552 (1951 & 1979 Supp.). *Accord*, Annot., 54 A.L.R.2d 1298, at 1317-19 (1957 & 1978 Supp.). As stated recently by a federal district court:

> "It is fundamental that in the absence of statute an unsuccessful litigant may not maintain a civil suit for damages against a person for alleged perjury committed by him in a civil action, a criminal prosecution or other proceeding, either as a party or as a witness." *Smith v. Sinclair*, 424 F. Supp. 1108, 1113 (W.D. Okla. 1976) (citations omitted).

More than eighty years ago, a New York court referred to the "entire unanimity of judicial opinion" on this issue. *Young*

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6 *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

v. Leach, 27 A.D. 293, 296, 50 N.Y.S. 670, 671 (1st Dep't 1898). The unanimity of this "ancient rule," *Newin Corp. v. Hartford Accident & Indemnity Co.*, 37 N.Y.2d 211, 217, 333 N.E.2d 163, 166, 371 N.Y.S.2d 884, 889 (1975), survives to this day and "is followed by . . . the Federal Courts," *Liddell v. Smith*, 345 F.2d 491, 494 (7th Cir. 1965), as well as by all other courts that have addressed the issue.[7] This rule required dismissal of Alberta Gas's complaint.

At first glance, the rule against private damage actions for perjury may seem to be a harsh rule. In some individual cases—although not in this case—it may indeed be a harsh rule. But the policy reasons behind the rule justify any hard-

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7 *See, e.g., United States v. Throckmorton*, 98 U.S. 61 (1878); *Charles v. Wade*, 665 F.2d 661 (5th Cir. 1982); *Liddell v. Smith*, 345 F.2d 491 (7th Cir. 1965); *Levy v. Hayward*, 248 F.2d 152 (D.C. Cir. 1957), *cert. denied*, 356 U.S. 941 (1958); *Chase v. Brecke*, 509 F. Supp. 241 (D. Minn. 1981); *Smith v. Sinclair*, 424 F. Supp. 1108 (W.D. Okla. 1976); *Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc.*, 358 F. Supp. 17 (E.D. Tenn. 1972), *aff'd without opinion*, 477 F.2d 598 (6th Cir. 1973); *Maicobo Investment Corp. v. Von Der Heide*, 243 F. Supp. 885 (D. Md. 1965); *Ragsdale v. Watson*, 201 F. Supp. 495 (W.D. Ark. 1962); *Robinson v. Missouri Pacific Transportation Co.*, 85 F. Supp. 235 (W.D. Ark. 1949); *Hokanson v. Lichtor*, 5 Kan. App. 2d 802, 626 P.2d 214 (1981); *Alexander v. City of Peekskill*, 80 A.D. 2d 626, 436 N.Y.S.2d 327 (2d Dep't 1981); *Serrano v. Flight Motel, Inc.*, 95 Misc. 2d 669, 408 N.Y.S.2d 198 (Sup. Ct. Queens Co. 1978); *Kachig v. Boothe*, 22 Cal. App. 3d 626, 99 Cal. Rptr. 393 (4th Dist. 1971); *W.G. Platts, Inc. v. Platts*, 73 Wash. 2d 434, 438 P.2d 867 (1968); *Morris v. Nowotny*, 398 S.W.2d 661 (Tex. Civ. App. 1966); *John Allan Co. v. Brandow*, 59 Ill. App. 2d 328, 207 N.E. 2d 339 (3d Dist. 1965); *Bromund v. Holt*, 24 Wis. 2d 336, 129 N.W.2d 149 (1964); *Morris v. Taylor*, 353 S.W.2d 956 (Tex. Civ. App.), *cert. denied*, 371 U.S. 842 (1962); *Gillikin v. Springle*, 254 N.C. 240, 118 S.E.2d 611 (1961); *Brewer v. Carolina Coach Co.*, 253 N.C. 257, 116 S.E.2d 725 (1960); *Agnew v. Parks*, 172 Cal. App. 2d 756, 343 P.2d 118 (2d Dist. 1959); *Anchor Wire Corp. v. Borst*, 277 A.D. 728, 102 N.Y.S.2d 871 (1st Dep't 1951); *Kinter v. Kinter*, 84 Ohio App. 399, 87 N.E.2d 379 (1949); *Kantor v. Kessler*, 40 A.2d 607 (N.J. 1945).

ship that it may occasion in specific cases. Those reasons are as follows:

> 1. The rule reflects the desirability of putting an end to litigation and avoiding the situation whereby a losing party could return to the fray with a charge of perjury, to be followed by a similar charge by the losing party in the second proceeding, and so on. *See, e.g., United States v. Throckmorton*, 89 U.S. 61, 65 (1878).
>
> 2. The rule advances judicial economy and propriety by requiring that an attack on a prior decision be brought directly before the tribunal that rendered the decision, rather than collaterally. *See, e.g., Maicobo Investment Corp. v. Von Der Heide*, 243 F. Supp. 885, 893 (D. Md. 1965).
>
> 3. The rule serves to encourage witnesses to come forward without fear of later damage actions. *See, e.g., Charles v. Wade*, 665 F.2d 661, 666 (5th Cir. 1982); *Nichols v. Alker*, 231 F.2d 68, 80 (2d Cir.), *cert. denied*, 352 U.S. 829 (1956) (Frank, J., concurring).
>
> 4. The rule leaves to the criminal law, with its procedural safeguards, the evaluation and prosecution of perjury charges. *See, e.g., Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc.*, 358 F. Supp. 17, 22 (E.D. Tenn. 1972), *aff'd*, 477 F.2d 598 (6th Cir. 1973).

In the court below, Alberta Gas did not dispute the validity of this rule. Alberta Gas argued only that its complaint fell within a narrow exception, which permits a damage action when the perjury is "but an incident" to a larger fraudulent scheme. *Nichols v. Alker*, 231 F.2d 68, 80-81 (2d Cir.), *cert. denied*, 352 U.S. 829 (1956) (Frank, J., concurring). That exception applies only when a plaintiff alleges "fraudulent conduct beyond the giving of false testimony." *Levy v. Hayward*, 248 F.2d 152, 153 (D.C. Cir. 1957), *cert. denied*, 356

U.S. 941 (1958). Here, however, Alberta Gas has alleged no wrongdoing other than perjury. This is not a mere defect in pleading. In fact, in the District Court, Alberta Gas "was offered the opportunity at oral argument to amend the complaint so as to allege fraudulent conduct other than the perjury, but declined to do so" (App. A-4). Alberta Gas's complaint therefore falls squarely within the rule, not the exception (App. A-3–A-5).

B. The Decisions Relied On by Alberta Gas Are Entirely Inapposite.

In its petition to this Court, Alberta Gas ignores the common-law rule that there is no private cause of action for perjury, as well as the legion of authority that supports that rule. Instead, Alberta Gas relies on three antitrust cases, *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674 F.2d 1252 (9th Cir. 1982); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972); and *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972). Alberta Gas asserts that these cases hold "that a party can maintain a private cause of action for damages suffered by it as a result of misrepresentations made to an administrative agency by another party" (Petition at 7) and that therefore these cases are in conflict with the decision below. This simply is not so.

Each of the cases relied on by Alberta Gas was an antitrust action. In each of those cases, the plaintiff had stated all the elements of an antitrust violation. In each of those cases, the issue was whether, in an antitrust context, the filing of false information with an administrative agency comes within the *Noerr-Pennington* doctrine, which, on First Amendment grounds as well as other grounds, exempts from antitrust liability joint efforts to influence legislative or executive action, even when such efforts are designed to injure or eliminate

competition.[8] In each of those cases, it was held that the filing of false information with an administrative agency does not come within the exemption. The basis for that holding was stated by the District of Columbia Circuit in *Israel*:

> "No actions which impair the fair and impartial functioning of an administrative agency should be able to hide behind the cloak of an antitrust exemption." 466 F.2d at 278.

In other words, as stated by the Ninth Circuit in *Clipper Exxpress*, "so long as the elements of an antitrust claim are alleged," the filing of false information with an administrative agency does not come within the exemption of *Noerr-Pennington*. 674 F.2d at 1272. But that rule is inapplicable here. No antitrust claim has been asserted by Alberta Gas, and no *Noerr-Pennington* exemption has been sought by Celanese. This is a common-law damage action for perjury, and there is nothing whatsoever in *Clipper Exxpress*, *Woods Exploration*, or *Israel* which suggests that any such action can be maintained.

II.

The District Courts Do Not Have Jurisdiction Over Collateral Attacks on Determinations by the International Trade Commission.

Virtually ignoring the arguments it made below, Alberta Gas now contends that the dismissal of its collateral attack on the determination of the Commission would be subversive of the integrity of the Commission's processes (Petition at 9-11, 15). Quite the contrary is true.

The procedures for challenging determinations made by the Commission are clearly set forth in federal statutes. In 28

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8 *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

U.S.C. § 1582 (and its successor, 28 U.S.C. § 1581), Congress has vested in the Court of International Trade (formerly the Customs Court) exclusive jurisdiction to review the Commission's determinations. In 28 U.S.C. § 1541(a), Congress has vested in the Court of Appeals for the Federal Circuit (formerly the Court of Customs and Patent Appeals) exclusive appellate jurisdiction over judgments of the Court of International Trade. These statutes reflect the decision of Congress that the efficiency and integrity of the customs laws and customs tribunals will be best protected if questions involving the customs laws, including determinations by the Commission, are decided exclusively by the Court of International Trade and, upon further appeal, by the Court of Appeals for the Federal Circuit. These tribunals provide a "complete system of corrective justice with respect to matters arising under the customs laws." *Cottman Co. v. Dailey*, 94 F.2d 85, 88 (4th Cir. 1938) (App. A-5-A-6).

In the case at bar, under 28 U.S.C. § 1582 (and its successor, 28 U.S.C. § 1581), the District Court, sitting in diversity, lacked subject-matter jurisdiction over Alberta Gas's collateral attack on the Commission's determination. This result is consistent with all other judicial constructions of 28 U.S.C. § 1582. The courts have uniformly held that Congress "intended that matters involving customs laws should be heard by one tribunal so that uniformity of decision would result." *Jerlian Watch Co. v. United States Department of Commerce*, 597 F.2d 687, 691 (9th Cir. 1979). *Accord, Consumers Union of United States, Inc. v. Committee for Implementation of Textile Agreements*, 561 F.2d 872 (D.C. Cir. 1977), *cert. denied*, 435 U.S. 933 (1978); *J.C. Penney Co. v. United States Treasury Department*, 439 F.2d 63 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971); *Barclay Industries, Inc. v. Carter*, 494 F. Supp. 912 (D.D.C. 1980).

As the District Court observed, Alberta Gas's collateral attack on the Commission's determination sought a *de facto* reversal of the Commission's determination by shifting the resultant antidumping duties to Celanese through the device of

a damage award (App. A-6). The antidumping laws were "designed to prevent actual or threatened harm to a domestic industry caused by the sale of merchandise in the United States at prices lower than in the country of origin." *J.C. Penney Co. v. United States Treasury Department*, 439 F.2d 63, 64 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971). This Congressional design is implemented by imposing antidumping duties based on the difference between an importer's price in the United States and his price in his home markets, in order to cause the importer to raise his prices in the United States. If, in a collateral attack, an importer could obtain a damage award to compensate him for the antidumping duties imposed upon him, the importer would have no reason to raise his prices in the United States. He could simply continue to sell his product at less than fair value, in derogation of the Commission's determination (App. A-5).

Moreover, if a federal district court or state court had jurisdiction over actions such as this, an importer could maintain two simultaneous attacks on a determination by the Commission: a direct attack in the Court of International Trade and a collateral attack in a district court or state court. This would result in a duplicative burden on courts and litigants, to say nothing of raising the specter of inconsistent results.

In addition, if it were decided by the district court or state court that perjury had been committed before the Commission, that court would then have to decide whether the Commission would have reached a different conclusion absent such perjury (App. A-5; App. B-5). To resolve this issue, the court would have to review the entire record before the Commission and then, putting aside the perjured testimony, make its own independent evaluation of likelihood of injury. Such a review would require the court to consider the "unique combination and interaction of many economic variables" evaluated by the Commission in making its determination. *Armstrong Brothers Tool Co. v. United States*, 483 F.Supp. 312, 328 (Cust. Ct.), *aff'd*, 626 F.2d 168 (C.C.P.A. 1980). It would require the court

to identify the factors that led the Commission to its determination and to assess the weight that was given to each factor. It might even require the court to compel testimony by the Commissioners themselves about their deliberative processes.

All of this would be disruptive and destructive of the integrity of the processes of the Commission and of the Court of International Trade, and would "significantly undermine Congress' 'complete system of corrective justice with respect to matters arising under the customs laws.' " *See J.C. Penney Co. v. United States Treasury Department*, 439 F.2d 63, 65 (2d Cir.), *cert. denied*, 404 U.S. 869 (1971), quoting *Cottman Co. v. Dailey*, 94 F.2d 85, 88 (4th Cir. 1938).

Alberta Gas contends, however, that dismissal for lack of subject-matter jurisdiction is inconsistent with this Court's decision in a patent case, *American Well Works Co. v. Layne & Bowler Co.*, 241 U.S. 257 (1916) (Petition at 14-15). That case construed 28 U.S.C. § 1338(a), which confers on the federal courts exclusive jurisdiction over cases "arising under" the federal patent statutes. Section 1338(a), unlike former 28 U.S.C. § 1582(a) and 28 U.S.C. § 1581(c), does not vest in a specialized court exclusive jurisdiction over all "civil actions" challenging determinations by a specialized tribunal. The scope of the exclusive jurisdiction of the federal courts under section 1338(a) is therefore not relevant to the scope of the exclusive jurisdiction of the Court of International Trade.

Directly in point is *Nichols v. Alker*, 231 F.2d 68 (2d Cir.), *cert. denied*, 352 U.S. 829 (1956). There, in a diversity action, the plaintiffs alleged that they had been injured by perjury in a proceeding before the Securities and Exchange Commission. The Court of Appeals concluded that another federal court, the "enforcement court", had been vested by statute with exclusive jurisdiction to review the SEC's determination. Although the plaintiffs argued that their so-called "tort action" did not seek review of the SEC's determination, the Court of Appeals affirmed dismissal of the complaint on the ground

that courts other than the enforcement court lacked subject-matter jurisdiction:

> "We hold that through the device of an apparently independent tort action the plaintiffs below may not bypass the Commission and the enforcement court in an effort to alleviate their treatment under the plan approved by the reorganization decree." 231 F.2d at 79.

Nor, in the case at bar, may Alberta Gas, through the same device of "an apparently independent tort action," bypass the Commission and the Court of International Trade by a collateral attack on the Commission's determination.

CONCLUSION

Celanese respectfully requests that Alberta Gas's Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit be denied.

Respectfully submitted,

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November 4, 1982

APPENDIX 1

1. 28 U.S.C. § 1582 [repealed]

(a) The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, where the administrative decision, including the legality of all orders and findings entering into the same, involves: (1) the appraised value of merchandise; (2) the classification and rate and amount of duties chargeable; (3) all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury; (4) the exclusion of merchandise from entry or delivery under any provisions of the customs laws; (5) the liquidation or reliquidation of an entry, or a modification thereof; (6) the refusal to pay a claim for drawback; or (7) the refusal to reliquidate an entry under section 520(c) of the Tariff Act of 1930, as amended.

(b) The Customs Court shall have exclusive jurisdiction of civil actions brought by interested parties under sections 516 and 516A of the Tariff Act of 1930, as amended.

(c) The Customs Court shall not have jurisdiction of an action unless (1) either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended, and denied in accordance with the provisions of section 515 of the Tariff Act of 1930, as amended, or if the action relates to a decision under section 516 and 516A of the Tariff Act of 1930, as amended, all remedies prescribed therein have been exhausted, and (2) except in the case of an action relating to a decision under section 516 and 516A of the Tariff Act of 1930, as amended, all liquidated duties, charges or exactions have been paid at the time the action is filed.

(d) Only one civil action may be brought in the Customs Court to contest the denial of a single protest. However, any number of entries of merchandise involving common issues

may be included in a single civil action. Actions may be consolidated by order of the court or by request of the parties, with approval of the court, if there are common issues.

(e) The Customs Court shall have exclusive jurisdiction of any civil action brought by a party-at-interest to review a final determination made under section 305(b)(1) of the Trade Agreements Act of 1979. For purposes of this subsection, the term "party-at-interest" means—

(1) a foreign manufacturer, producer, or exporter, or a United States importer of merchandise which is the subject of a final determination under section 305(b) of the Trade Agreements Act of 1979,

(2) a manufacturer, producer, or wholesaler in the United States of a like product,

(3) United States members of a labor organization or other association of workers whose members are employed in the manufacture, production, or wholesale in the United States of a like product, and

(4) a trade or business association a majority of whose members manufacture, produce, or wholesale a like product in the United States.

(f) The Customs Court shall have exclusive jurisdiction of any application for the issuance of a protective order under section 777(c)(2) of the Tariff Act of 1930.

2. 28 U.S.C. § 1581

(a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.

(b) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516 of the Tariff Act of 1930.

(c) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced under section 516A of the Tariff Act of 1930.

(d) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any final determination of the Secretary of Labor under section 223 of the Trade Act of 1974 with respect to the eligibility of workers for adjustment assistance under such Act;

(2) any final determination of the Secretary of Commerce under section 251 of the Trade Act of 1974 with respect to the eligibility of a firm for adjustment assistance under such Act; and

(3) any final determination of the Secretary of Commerce under section 271 of the Trade Act of 1974 with respect to the eligibility of a community for adjustment assistance under such Act.

(e) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review any final determination of the Secretary of the Treasury under section 305(b)(1) of the Trade Agreements Act of 1979.

(f) The Court of International Trade shall have exclusive jurisdiction of any civil action involving an application for an order directing the administering authority or the International Trade Commission to make confidential information available under section 777(c)(2) of the Tariff Act of 1930.

(g) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review—

(1) any decision of the Secretary of the Treasury to deny or revoke a customhouse broker's license under section 641(a) of the Tariff Act of 1930; and

(2) any order of the Secretary of the Treasury to revoke or suspend a customhouse broker's license under section 641(b) of the Tariff Act of 1930.

(h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation.

(i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section.

(j) The Court of International Trade shall not have jurisdiction of any civil action arising under section 305 of the Tariff Act of 1930.

APPENDIX 2

U.S. Department of Justice
Criminal Division
Office of the Assistant Attorney General
Washington, D.C. 20530

December 4, 1981

Michael Stein, Esq.
General Counsel
International Trade Commission
Washington, D.C. 20436

Dear Mr. Stein:

On August 21, 1981, we received a referral from your office regarding the proceedings held by the International Trade Commission in case AA1921-202 to determine whether the importation of methyl alcohol (methanol) by foreign producers should be subject to dumping duties under the Anti-dumping Act of 1921, as amended. The documents submitted to us reflect that a petition has been filed with the Commission by Alberta Gas and Chemicals, Ltd. ("Alberta"), a Canadian producer of methanol, which alleges that a representative of the Celanese Corporation, a U. S. producer of methanol, committed perjury and made false statements in testimony during these proceedings in violation of 18 U.S.C. §§ 1621 and 1001.

The history of this referral is somewhat complex, but should be briefly stated here. As a result of complaints made to the Treasury Department by domestic producers of methanol, Treasury conducted an antidumping investigation and, on March 23, 1979, concluded that methanol imported from Canada was being sold in the United States at less than fair market value.

The second stage of the dumping investigation, where the statements in question were made, was the proceedings con-

ducted by the Commission to determine if such importations and sales were likely to result in injury to the domestic industry. In a 3 to 2 decision rendered on June 29, 1979, the Commission found such injury, but this decision was subsequently overturned by the U.S. Court of International Trade ("USCIT").

Thereafter, and as a result of collateral civil litigation brought by Alberta, Alberta filed a petition before the Commission requesting it to find that Celanese had misrepresented and omitted material facts during the Commission proceedings, and that the Commission would not have found injury to domestic industry but for these misrepresentations. Your referral further indicates that the Commission has denied Alberta's petition on the grounds that its finding of injury has been mooted by the USCIT's reversal of this decision and, on the further grounds that it is not competent to determine whether Celanese violated 18 U.S.C. § 1001 (false statements to a Government agency) and § 1621 (perjury and false declarations).

In support of its allegations, Alberta's petition cites, *inter alia*, the following testimony, on May 15, 1979, by Thomas Kennedy, Business Director of Methyl and Nylon Chemicals of Celanese Company:

> *Vice Chairman Albergers*:
>
> * * *
>
> What about expansion plans at the moment?
>
> *Mr. Kennedy*: At the moment we have no finalized expansion plans. We are conducting a feasibility study in Saudi Arabia. I think that was mentioned earlier. We are conducting a number of studies in other areas. We have no finalized plans for expansion.

Alberta asserts that at the time this statement was made, Celanese companies were "actively moving toward" the prompt construction of major world-scale methanol producing plants in Alberta, Canada and the U. S. and, that less than 90 days after this Commission's determination, its subsidiary

(Celanese of Canada) announced its intention to build a $250 million methanol plant in Alberta and within six months announced that it was actively considering a billion dollar plant in the U. S.

We do not believe that the above-quoted testimony presents a suitable prosecutive vehicle under 18 U.S.C. 1001 or 1621.

Mr. Kennedy's testimony is qualified in two significant respects. First, Mr. Kennedy testified that we have no *finalized* expansion plans, which is a subjective characterization. Second, and in any event, criminal litigation premised upon such testimony would merely become a semantical contest over the meaning of the term "finalized." In this regard, Mr. Kennedy's use of the term "finalized" suggests that there were, in fact, plans under consideration. Indeed, he so indicated two sentences later in his testimony wherein he stated, "We are as well conducting a number of studies in other areas."

Additionally, if the precise nature of Celanese's plans was of significance to the Commission, we believe that Mr. Kennedy's response clearly invited it to pursue both the kind of plans Celanese had and the degree of finality or lack of finality of such plans.

As the Supreme Court stated in *U. S. v. Bronston*, 409 U.S. 352, 357-59 (1973), an unsuccessful prosecution for false statements to the grand jury,

> But we are not dealing with casual conversation and the [perjury] statute does not make it a criminal act for a witness to wilfully state any material matter *that implies* any material matter which he does not believe to be true. . . . we perceive no reason why Congress would intend the drastic sanction of a perjury prosecution to cure a testimonial mishap which could readily have been reached with a single additional question by counsel alert—as every examiner ought to be—to the incongruity of petitioner's unresponsive answer. Under the pressures and tensions of interrogation, it is not uncommon for the most earnest witnesses to give answers which are not entirely responsive. Sometimes the witness does not un-

> derstand the question, or may in an excess of caution or apprehension read too much or too little into it. . . . It is the responsibility of the lawyer to probe; testimonial interrogation, and cross-examination in particular is a probing, prying, pressing form of inquiry. If a witness evades, it is the lawyer's responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.
>
> It is no answer to say that here the jury found that petitioner intended to mislead his examiner. A jury should not be permitted to engage in conjecture whether an unresponsive answer, true and complete on its face, was intended to mislead or divert the examiner; the state of mind of the witness is relevant only to the extent that it bears on whether "he does not believe [his answer] to be true." To hold otherwise would be to inject a new and confusing element into the adversary testimonial system we know. Witnesses would be unsure of the extent of their responsibility for the misunderstandings and inadequacies of examiners, and might well fear having that responsibility tested by a jury under the vague rubric of "intent to mislead" or "perjury by implication."

Alberta's assertion that Celanese subsidiaries were "actively moving toward prompt construction of methanol plants" is their subjective characterization of activities. Literally speaking, the most intricate plans may not be finalized until all construction and financing contracts are signed, or perhaps not even until the first spike is driven. In this regard, if plans were truly final, it would not seem necessary to use such a description as "actively *moving toward* prompt construction," which inherently suggests that differences in this matter are those of degree and opinion.

Similarly, Celanese's announcement six months after the Commission's ruling, that it was "actively considering" a billion dollar plant in the U. S. suggests merely what it says and is not inconsistent with the testimony that there were no

finalized plans. Moreover, even if plans were being actively considered prior to Mr. Kennedy's testimony, subjective and objective differences between finalized plans and non-finalized plans may be as varied as the contingencies that can result in modification or abandonment.*

Alberta's petition further alleges that Mr. Kennedy testified falsely and omitted material facts when he stated, "We believe that there is sufficient capacity in the U. S. with announced plans and expansions to satisfy U. S. demand for methanol . . . I'm talking about a three to four year time period . . ." In this regard, Mr. Kennedy did not state an objective fact, but a belief. Additionally, his statement is not merely an opinion as to past occurrences, but is an estimate or prediction of the future, which may and can be a combination of personal speculation, and/or innumerable factors contained in, or extrinsic to internal company documents. Nor do we see anything in Alberta's complaint which is squarely inconsistent with this testimony, including estimates made months after the fact by a Canadian Celanese subsidiary, of percentages of methanol that could be supplied to the U. S. in the future, by a plant that could be built in the future. Of similar import is Mr. Kennedy's speculation as to percentages of domestic increases in the demand for methanol in the future, which Alberta has contrasted in its complaint to opinions of percentages of future increases in U. S. consumption of methanol, which were made in Canada months later by a subsidiary of Celanese.

We also do not believe that the foregoing instances of Mr. Kennedy's testimony would present a suitable prosecutive vehicle under a theory that he willfully omitted material facts, in violation of 18 U.S.C. 1001.

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* The Commission and Court decisions supplied to us reflect that Alberta, the complaintant, also had plans to build facilities, but that there were a number of contingencies which could affect the implementation of these plans, such as financing, market changes and international trade agreements (Exhibit E, pp. 18-21). Interestingly enough, a majority of the Commission also surmised that the implementation of construction plans by Alberta was contingent upon the Commission's decision in the dumping proceeding.

Mr. Kennedy's estimates as to future increases in consumption, for example, do not clearly lead themselves, in this case, to omissions of material facts, since his opinion or speculation was neither disguised as a fact, nor do the differing opinions become facts merely because they differ. Both estimates necessarily and obviously involved predictions as to the future, so that none of the estimates may turn out to be correct; or, time as well as foreseen and unforeseen changes in conditions may show Mr. Kennedy's prediction to have been the most astute.

Of equal significance is the fact that the Commission selected the areas of inquiry and, if the details of Celanese's construction plans, or its estimates of future demand and consumption were material to its proceedings it was free to pursue Mr. Kennedy's answers further. *See U. S. v. Bronston*, *supra*, 409 U.S. at 358 n. 4. Thus, allegations that Mr. Kennedy concealed or withheld information, and that such information was material, requires the sort of speculation which is impermissible in a criminal prosecution.

Accordingly, we respectfully decline prosecution in this matter.

Sincerely,

/s/ D. LOWELL JENSEN
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Assistant Attorney General
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No. 82-497

In The

Supreme Court of the United States

October Term, 1982

ALBERTA GAS CHEMICALS, LTD.,
Petitioner,

v.

CELANESE CORPORATION and CELANESE CHEMICAL COMPANY, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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November 10, 1982

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PETITIONER'S REPLY BRIEF

This brief is in reply to the brief filed by respondents ("Celanese") in opposition to the petition for a writ of certiorari filed by petitioner ("Alberta Gas").

A. Conflict Among the Circuits.

Celanese contends that there is no conflict between the decision of the Second Circuit in this action and the decisions of the Ninth, Fifth and District of Columbia Circuits in *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*, 674

F.2d 1252 (9th Cir. 1982), *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047 (1972), and *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272 (D.C. Cir. 1972). (Celanese brief at pages 10-11). Celanese seizes upon the circumstance that those cases were brought under state and federal antitrust laws while the present case involves unfair competition.

Even the most cursory reading of *Clipper Exxpress*, *Woods Exploration* and *Israel* leads to the conclusion that the nature of the cause of action was irrelevant to the decision. In each of those cases, the court held that a cause of action exists when intentional misstatements made by a competitor to an administrative agency have damaged the plaintiff.[1] The concern of each court was to protect the integrity of the administrative process. Each court recognized the inability of administrative agencies to verify all the facts presented by the parties; and each court recognized the deterrent effect of a private cause of action for intentional misstatements. For example, the Ninth Circuit was not confining itself to any particular cause of action when in *Clipper Exxpress* it recognized that a private action can be based on a fraudulent misrepresentation to an administrative body:

> "*Adjudicatory procedures will not always ferret out misrepresentations. Administrative bodies and courts*, however, *rely on the information presented by the parties* before them. They seldom, if ever, have the time or resources to conduct independent investigations. *The recognition, however, of a private right of action based on the fraudulent*

[1] Although it is true that in each of those cases all the elements of an antitrust violation were stated, it is clear that the sole tortious act was the misrepresentation made by the defendant to an administrative agency. ("[A] cause of action is established so long as the elements of an antitrust claim are alleged and the violation is executed through fraudulently supplying information." *Clipper Exxpress*, 674 F.2d at 1272.) Similarly, all the elements of a claim of unfair competition have been set forth in the complaint in this case and the violation was executed by Celanese's fraudulently supplying information to the International Trade Commission.

misrepresentation, might be sufficient incentive to induce parties not to fraudulently misrepresent facts." Clipper Exxpress, 674 F.2d at 1272 (Emphasis added).

Alberta Gas alleges in its complaint that Celanese's intentional misstatements to the International Trade Commission were part of a plan designed, *inter alia,* to delay or prevent Alberta Gas from constructing additional facilities to produce methanol in Alberta, Canada. (App. G-2). Celanese's plan to suppress Alberta Gas's ability to engage in sales activities echoes the defendants' plan in *Israel* to block the approval for sale of the plaintiffs' drug, the defendants' plan in *Woods* to issue false production forecasts which would reduce the plaintiffs' quota of permissible production and the defendants' plan in *Clipper Exxpress* to delay the approval of tariffs upon which the plaintiff's opportunity to offer its services depended. All these plans were implemented by lying to an administrative agency. The Fifth, Ninth and District of Columbia Circuits recognized that such conduct compromises paramount public interests. Even the Second Circuit declared on Alberta Gas's first appeal to that court that there is a "clear public interest in a correct determination of whether imports of methanol should be restricted, since the restrictions will almost certainly affect the price American consumers pay for this product." (App. B-8). By subsequently discerning impediments to a cause of action for lying to an administrative agency, the Second Circuit brought itself into irreconcilable conflict with the other Courts of Appeals.

Celanese wants this Court to view *Clipper Exxpress, Woods Exploration* and *Israel* as merely part of the *Noerr-Pennington* line of cases. However, the only reason *Noerr-Pennington* was discussed in those cases was because the defendants sought to hide behind that doctrine. The reasons for allowing suits based on fraudulent misstatements made to administrative agencies far outweigh any basis for immunity referred to in *Noerr-Pennington.* (*See also* Alberta Gas Petition at page 9, footnote 7).

B. Celanese's Other Arguments.

All of Celanese's remaining arguments avoid the issue presently before this Court, *i.e.*, whether to resolve the conflict among the circuits created by the Second Circuit's decision in the instant action. Instead, Celanese argues the substantive issue of whether courts should recognize a cause of action for perjury committed before an administrative agency. In other words, it argues that *Clipper Exxpress, Woods Exploration* and *Israel* were all incorrectly decided.

Not only are those arguments irrelevant to the issue presently before this Court, they are incorrect:

1. Celanese asserts the "ancient rule" that "no action lies to recover damages caused by perjury." (Celanese brief at pages 7-8). It cites *Newin Corp. v. Hartford Accident & Indemnity Co.*, 37 N.Y.2d 211, 217, 333 N.E.2d 163, 166, 371 N.Y.S.2d 884, 889 (1975). In actuality, *Newin* holds that there is an exception to that rule where the issue raised in the second action is broader than, or different from, the claim in the first action. Celanese reluctantly recognizes that holding but then argues that the exception requires conduct other than the perjury itself. (Celanese brief at pages 9-10). Again, under the facts in *Newin* this is clearly not true:

> "[T]he *sole* moving factor in the alleged fraud and deceit . . . [was] the allegedly false testimony. . . ." *Id.* at 220, 333 N.E.2d at 168, 371 N.Y.S.2d at 892. (dissent; emphasis in original).[2]

The pillar of the "ancient rule" against suits based on perjury is the doctrine of *res judicata*. *See Smith v. Lewis*, 3 Johns. 157 (N.Y. 1808), which was cited in *Newin*. The rule derives from the concept that misrepresentations of fact in a litigation are deemed to be implicitly litigated and are not subject to relitigation because of the doctrine of *res judicata*. Clearly, therefore, the rule is totally inapplicable to mis-

[2] Obviously, if there were fraudulent conduct in addition to the perjury there would be no need to invoke the exception. Instead, there would be a simple allegation of basic fraud.

statements made to administrative agencies where, as in the instant action, there are no "parties" to the proceeding, no discovery, no effective cross-examination and no meaningful opportunity to "litigate" the perjury issue.[3] The cases cited by Celanese in support of the general rule against suits for perjury (Celanese brief at page 8, footnote 7), are inapposite to the facts in the instant action because in each instance the plaintiff had at least one opportunity to obtain relief for the injury which it suffered. That fact contrasts sharply with the instant action in which Alberta Gas has no remedy to seek compensation for the damages which it suffered at the hands of Celanese, unless such remedy is available in the present case. The Court of International Trade is powerless to provide damages. *See* Celanese brief, Appendix 1.

2. Celanese asserts that this action is an attempt by Alberta Gas to obtain damages for the antidumping duties imposed on it. (Celanese brief at pages 12-13). In fact, no antidumping duties were ever paid by Alberta Gas and no claim for damages relating to those duties is being sought by Alberta Gas. Rather, Alberta Gas is seeking, among other things, damages for the sales and profits which it lost because of Celanese's misrepresentations. None of the customs tribunals have ever had the power to award damages.

3. Celanese argues that *Nichols v. Alker*, 231 F.2d 68 (2d Cir.), *cert. denied*, 352 U.S. 829 (1956), is "[d]irectly in point" in support of its contention that the district court did not have subject matter jurisdiction. (Celanese brief at pages 14-15). Yet *Nichols* was completely different from the instant action. The issue in that case was whether the plaintiffs could bring their action despite the facts that (i) they had been lawfully enjoined from doing so under a decree issued by a federal

[3] This Court has expressly recognized "that *res judicata* principles do not apply to administrative proceedings" unless the "administrative agency is acting in a judicial capacity and resolves disputed issues of fact properly before it which the parties have had an adequate opportunity to litigate." *United States v. Utah Construction and Mining Co.*, 384 U.S. 394, 421-22 (1966).

district court and (ii) they had previously brought virtually the same action in the same court and the prior action had been dismissed on the merits. Obviously, *Nichols* bears no resemblance to the instant action, in which Alberta Gas has not otherwise had an opportunity to seek a private remedy.

4. Celanese appears to repeat its contention first made in the Court of Appeals that Celanese's testimony to the International Trade Commission was helpful to Alberta Gas and not harmful. (Celanese brief at page 4, footnote 3). This contention rests on a misreading of the opinion of the Court of International Trade.[4]

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[4] The Court of International Trade did not state that the commission majority made a finding "that there would be no future expansion" of methanol consumption in the United States. Rather, the court criticized the commission for concluding that if Alberta Gas's new plant became operational in the future, the amount of methanol available from Canada would represent 10% of U.S. consumption—because the commission was comparing *future* imports from Canada with *current* U.S. consumption to arrive at that critical percentage. The court stated: "Thus, the commission majority not only assumed the future increased capacity available for export to the United States, but also implicitly postulated, contrary to the evidence in the record, that there would be no future expansion in the United States consumption of methyl alcohol." *Alberta Gas Chemicals, Inc. v. United States,* 515 F. Supp. 780, 791 (U.S.C.I.T. 1981). In other words, the court was criticizing the commission for comparing future imports with current consumption.

Celanese also misperceives the holding of the Court of International Trade when it asserts that the court reversed the commission, in part, because the commission had incorrectly found "that there was a likelihood of 'expanding supplies of methyl alcohol from Canada' " and that information about Celanese's planned expansion in Canada (which Celanese now admits) would have supported the commission's finding. The court's concern was not with the amount of methanol to be produced in Canada by new plants. Rather, the court was concerned with the fact that the construction of plants to produce methanol took many years to complete and that such plants could not be considered "real and imminent" dangers to the United States methanol market. *Id.* at 791. Since the development of the Celanese plant was behind that of the Alberta Gas plant, truthful testimony would not have changed the view of the court that the construction of the Alberta Gas plant was not presenting a "real and imminent" danger.

CONCLUSION

For the foregoing reasons and the reasons set forth in its petition, Alberta Gas respectfully prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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